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IN EMPLOYMENT

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"LIFESTYLE" DISCRIMINATION IN EMPLOYMENT

Stephen D. Sugarman¹

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 examples. Ted Turner's Turner Broadcasting System adopted a policy of hiring only non-smokers. Wal-Mart fired two sales associates who violated the firm's ban on dating between employees who work in the same store. Commercial airlines suspended pilots who smoked marijuana on their days off. Coors Brewing pressed its workers to wear seat belts whenever they drive. The Air Force brought court martial proceedings against officers who committed adultery. Professional sports leagues disciplined players and owners for associating with gamblers. The Marines (briefly) announced that they only wanted single recruits. Around the nation workers have been fired for conduct as diverse as posing as centerfolds or belonging to the KKK; others have been refused jobs because they have criminal records, are homosexuals, or are married to an existing employee of the firm.

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 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. Indeed, when the issue is put in an abstract way, many are quick to assert that what people do on their own time ought to be entirely their own to decide and should be none of their employer's business.

On the other hand, when our focus is brought from the lofty plane of abstract principles down to specifics, it is also clear that, at least in certain circumstances, employers do have some legitimate interests in people's off-work activities that everyone would concede. 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

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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 drunk (slurring her words and unable to walk straight) and is discharged for it, it again won't do for her to claim that it is none of her employer's business that she chose 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 people's 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.

The employer in these examples may also be seen to 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, because it is simply the consequence – worker incompetence – that concerns the employer. It may also be said in these examples that there is a very tight connection between how the applicant/employee acted on her own time and harm to the employer were she allowed to work. That is, although 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 call it the other way.

The difficulty, as we will see, is that for just about all of the situations to be canvassed here 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 somewhat alter the facts of our two examples. Now 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 well some day come to work drunk, or will embarrass the firm, 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 outrageous this intrusion by an employer on marital autonomy. Suppose the employer argues that having this person continue in the work force will be harmful to the business because of how other employees and customers will react to the interracial marriage. Our instinct is to reject this sort of justification and to want to forbid the discharge (even if it doesn't precisely amount to racial discrimination against the employee which would make it already illegal under conventional employment discrimination laws). 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 many people sympathetic to providing him a legal right to keep his job.

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 issue – rules that differ considerably from state to state. Part VI presents, in a more structured way, a 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.

I. 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. In other words, to start with, 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 are 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 are risky and hence undesirable – such as when an employee aids (or may aid) a competitor or favors (or may favor) 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 as stealing from the firm or telling lies).

Because employees generally don't work in isolation and because turmoil is likely to impair the firm's effectiveness, employers also worry about strife within the organization both as among ordinary employees and as between employees and management (or supervisors). Hence, they tend to want employees who are cooperative, energetic, and friendly; by comparison, those whose behavior is offending, grudging, harassing or demoralized are generally to 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); 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 are a problem for employers. Absence not

only impairs productivity, but employee absence due to illness, 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 will be leery of any employee behavior that undermines the firm's position in the marketplace thereby causing, or threatening, a loss of patronage.

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 the proprietor or the board of the enterprise may also be at stake in employment decisions. Forming and operating an enterprise is one way for its owners/sponsors to express their own identity, that is, 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 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 isn't "like us."

Finally, it should be noted that in larger firms employment decisions are delegated and often fairly discretionary in practice. Hence, regardless of what are the official policies of organization itself, 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 getting in trouble with higher-ups, the safe strategy is to have nothing to do with the person.

II. 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 adverse employment decisions – tying that off-duty behavior to the variety of employer concerns described in Part I. The examples are largely drawn from real disputes, some of which were briefly mentioned in the Introduction. It should be emphasized at the start 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 rules 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." These include 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, depending on the circumstances, the worker's private relationships may be said to conflict with very different 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; (2) a company dismissed one of its executives for attending a convention with someone other than his spouse; (3) a school teacher was fired after an undercover police officer observed her at a "swingers' club" engaging in sexual acts with three different men; and (4) another employee was let go because of his marriage to a person of another race.

Employee loyalty was the issue in a much-publicized case some years back when a computer company fired a woman who married an employee of a competitor company. 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 are linked to the Bank's actions.

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. Originally aimed at preventing the employment of an employee's children or

the children of employee's sibling (from the Latin "nepos" for nephew), these 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, these policies frequently have had their main impact on spouses, typically wives. 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 of one of the spouses.

Somewhat similar are the policies that some firms have forbidding dating among employees. These too are justified by various 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. 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.

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 then policy against "extramarital affairs" (the woman was separated from, but not divorced from, her husband). In the same vein, the military's ban on "adultery" made news 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 in turn was married to an air force employee) and then, in the fallout, with several of its high ranking generals (who also conceded having affairs while married). 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. Arguably, the Air Force is worried about sexual harassment of the spouses (read "wives") of those junior to the rule-offending officers; or it may want to provide assurance to stay-at-home spouses of the fidelity of those who are away on assignment; or it may simply worry that extramarital affairs often lead to trouble that it would rather have its officers avoid. More likely, however, this policy simply reflects a long-standing commitment to punish what the military services consider to be immoral conduct by those who are, in effect, considered "on duty" all the time. (Interestingly enough, one apparent reason for covert violation of the rule against adultery is that high-ranking officers also generally believe

that their careers are in jeopardy if they divorce – on the ground that this too shows a moral failing in one's private life.)

Discrimination on the basis of so-called sexual orientation is a widely publicized issue. For my purposes it is sufficient to agree that homosexual conduct is, at least in some senses, a "lifestyle" and therefore part of the topic under examination here. In short, I want to avoid dealing with the bigger question of whether or not being gay or lesbian 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.

Let me just note, however, that the ongoing controversy over gays and lesbians in the military is but one prominent example of this sort of discrimination. As another example, not long ago headlines featured a lesbian lawyer who was denied a government job by Georgia's state attorney general – a man who had earlier successfully defended the state's sodomy laws in the U.S. Supreme Court (and admitted having had a heterosexual extramarital affair). It is worth noting that employers who discriminate against gays and lesbians will often offer mixed economic and moral justifications for their policies.

Finally, we should not forget that not too long ago women who got married, got pregnant, and/or had children were unabashedly unwelcome at many places of employment. Those clearly gender-based policies are now governed by core civil rights laws dealing with sex discrimination, as enhanced by pregnancy discrimination laws. I will have more to say later about the connection between those laws and legal rules that do, or might, protect employee privacy interests. For now, I want simply to note that gender-neutral employment policies based on marital and/or parenting status that employers might have today are plainly a matter of lifestyle discrimination and hence squarely part of my subject.

For example, as noted earlier, in the fall of 1993 the 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. (President Clinton overturned the policy, however, so that it was never put into effect.) Later, President Clinton signed an executive order banning discrimination by certain employers against people on the ground that they are parents. Apparently, the President found it morally or politically unacceptable 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 are also at stake here. That is, 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 only covers regulation by government).

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. Perhaps she 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 tolerate their employees taking these concerns outside the firm.

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 pedophiles), and the employer may say it is responding to pressures from other employees and customers. Other times the worker's politics are simply 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 health plan costs. Typical examples here

concern dangerous activities like hang gliding and sky diving. Such prohibitions are especially common in the contracts of professional athletes and theatrical stars who are making a movie or appearing in a play – 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.

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

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 the event got into the newspaper). In another, the employee was fired after he "moonied" someone (by contrast in yet another case, the employee was discharged for his unwillingness to join in a mooning escapade). As a final example, employees of a conservative Boston banking firm were cautioned when a local newspaper reported that several of them (men and women together) were meeting at a bar after work and drinking shots of liquor from each other's navels (apparently this sophomoric practice didn't fit the firm's image very well).

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.

Some employers, for example, forbid either working for competitors or operating a competing part-time business of one's own. In these cases the employer may be especially worried about the loss of trade secrets and/or the loss of customers. Other firms, worried about their image, balk at certain types of objectionable work. For example, in one case, noted earlier, the employee was discharged because she had posed as a "centerfold." Still other firms ban moonlighting altogether, probably on the ground that a person who works all the time will be too tired and hence ineffective in her

performance. 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 regular employer that they are actually devoting “full time” to being a professor.

E. Daily Living. The focus next shifts to activities of daily living carried on outside of the workplace, including people's 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, as illustrated by the Turner Broadcasting System example given at the outset. No-smoker policies have been justified as limiting health care costs, making it easy implement workplace no-smoking policies, and avoiding employees who are likely to absent more than average.

Some employers have sought to influence how their employees drive their cars; as noted earlier, Coors financially rewards those who use seat belts (hoping in part to reduce its health care costs). Other employers try to control what vehicles their employees drive (generally for image reasons). In one case, for example, a service worker at a Ford dealership was disciplined after he purchased a competitor's car..

It is widely believed that many people's blood pressure, weight and cholesterol levels are markedly influenced by their private lifestyle choices and can be altered through conscientious efforts – even though it is also generally agreed that, in some cases, these health indicators are pretty much 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. But sometimes these private choices can wind up disqualifying people from employment. For example, a while ago the ACLU brought cases against a number of local governments which refused to hire smokers and/or those with high blood pressure or cholesterol readings. On the whole, these employers seem to be most concerned about potential health care costs.

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 may be another. 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. Either way, these policies impact on how employees can conduct themselves off the job.

Note well that some employers only care about certain off-duty behavior when it is either done in public or becomes public. That is, they would be willing to ignore this conduct if no one else knew about it; or put differently, they would be happy not to know about it, if the behavior were not generally known. But once the conduct becomes known, then 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. Certain military leaders may feel this same way about both homosexual conduct and adultery among the ranks – hence the support for a “don’t ask, don’t tell” policy. This point is not invariably true, of course. For example, an airline might wish no longer to employ someone who “streaks” the baggage claim area even if the event got no publicity – because the employer’s decision is motivated by other than (or more than) concerns about its image (e.g., the airline may believe that a person who acts this way doesn’t have the sort of judgment the firm thinks is appropriate for his 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 not part of my topic.) Some employers may be unforgiving of (virtually) every off-the-job illegal act, while others may pick and choose. In each case let us assume 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 very wide range of criminal conduct. Violent crime seems especially likely to have employment repercussions – primarily because of fellow employee, customer and public sentiment. Yet property crime too can readily lead to a job loss, especially if the employer believes it indicative of a risk of employee theft of employer property (e.g., suppose a bank teller or bookkeeper has been shown to have defrauded a local non-profit agency or a neighbor).

Three types of crimes that have been most controversial when negative employment decisions follow are those involving traffic offenses (especially drunk driving), drug use, and sexual activities (of a very broad nature including homosexuality, adultery, non-marital sex, sex with minors, incest, sexual abuse, and matters involving

pornography). Employers who reject people who have engaged 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.

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: the illegal behavior may involve or victimize other employee or customers (e.g. sex crimes with fellow employees, supervisors or underlings; 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).

Certain crimes suggest a much greater risk of future on-the-job misconduct than do others. Compare, 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. Compare, for example, an airline pilot convicted of using illegal drugs with a pilot convicted of income tax evasion or with 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. For example, a salesman for a dairy was suspended following his arrest for the illegal sale of alcohol, pandering, and conducting obscene exhibitions. Pro-sports leagues have several times faced the problem of having to decide what to do with players who are accused of rape or other serious crimes, and, in some cases, are awaiting trial on such charges.

On some occasions, for one reason or another, there never is a formal conviction or punishment in the criminal courts even though there is no real doubt in the employer's mind 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." Here we are talking about employers' rights to refuse to hire otherwise qualified "ex cons." Many employers 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.

III. 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 behavior in predicting future consequences to the firm, as well as (2) how they find out about such conduct.

A. Applicants. If they are faced with several applicants for any open position, employers need to have some way (formal and/or informal) to winnow away the competitors 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 is often no "typing" test of the sort that could be given to applicants for a typist position. Moreover, for reasons already noted, employers may well prefer someone other than the individual who has the best technical skills for the job in question. Other features about the person may make her more attractive, on balance, than other more competent applicants.

The role of prediction can't be emphasized too much here. Of course, 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 go with the former. 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 good predictors of who will be a valuable employee, or more likely, who won't be.

Furthermore, employers 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 have yielded a more desirable employee, the employer chooses to forego that opportunity on the ground that the benefits are outweighed by the costs.

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 to the employer. 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."

Employer experience with the polygraph, i.e., the lie detector, illustrates this point. Suppose 1000 applicants 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, it is generally thought (or at least I will assume for my purposes here), 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 it may matter little. 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 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 thieves.

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 further to 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, in fact insurers frequently make only fairly gross distinctions among insureds based upon broad rules-of-thumb. This is explained on the ground that further efforts to classify would be inefficient.

Returning to the employment setting, then, employers too may choose simply to rule out some applicants in a rather crude way on the ground that taking on these people on as employees might prove to have been undesirable. Note well that from the employer's viewpoint it need not be anything like certain that this undesirable consequence will occur before it makes economic sense to reject the applicant. Rather, as noted already, 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, etc.

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, say, health insurance, sick leave or worker's compensation claims. Or the employer may rule out those who present noticeable risks of theft or dishonesty, or disloyalty, or poor relations with other employees or supervisors, or lower productivity (owing either to competence or effort), or 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 detectors, then employers might forego their use for fear that the selection benefits from using the test would be more that offset by the loss of high quality applicants who would refuse to work for firms that use them. It is also worth noting that the willingness of employers to resort to off-work conduct as key hiring factors may well vary with the state of the labor market – that is, when the market is tight and employers are very eager to find new workers, they may well 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.

B. Employees. Turning our attention now to those who are already employees, it appears that employers tend to follow two approaches, often utilizing them in combination, in order both to control off-duty conduct in advance and to punish unacceptable off-duty conduct when it occurs.

The first strategy is to adopt and announce rules or policies concerning specific off-duty employee behavior that are designed to reduce risks of harm to the employer. These policies may re-iterate 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.

To be sure, especially when what is at stake is the control of those who are already employees, employers have to take into account the potential negative impact on employee morale and the like that can arise from imposing limits on employee off-duty behavior. Presumably, varying circumstances render that concern more or less salient, such as whether employees are easily replaced, whether many are effected by the rule, how popular the barred out-of-work conduct is and so on.

As with rules-of-thumb for screening out applicants, an enterprise's policies regulating employee off-work conduct also tend to be based on predictions that such conduct will lead to financial harm to the employer. That is, the employer is worried about the risk, say, that marrying a competitor's executive may undermine the employee's loyalty.

But employers are often unwilling to rely exclusively upon specific policies that are announced in advance. Events occur, often unexpected events, that trouble them, and they will want to be able to exercise their discretion to take action that they deem appropriate 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

kind of "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. In any event, I am talking here about 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 no occasion to think 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 last point illustrates the fact that where conduct occurs that is troubling to the employer, but was not specifically forbidden in advance, the employer may well only now have additional specific information available about just how damaging the conduct has actually been. For example, a law firm might find itself quickly losing clients when it is revealed that one of its lawyers stole money from his child's Little League team and yet has been retained by the firm. Moreover, sometimes the greatest risk of negative impact on the employer from the employee's behavior lies 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 his 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 papers and is drunk might be given leeway that would not be granted to others. Yet, even here, individualized treatment may not always be the wisest course from the employer's perspective. Rather, the advantages of having bureaucratic rules routinely-applied and of avoiding undesirable spillover consequences to other workers may cause a firm to forego the services of a troublesome employee despite his considerable contribution to the firm's profit when viewed in isolation.

C. Finding Out About Off-Duty Conduct. Employers use a great 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. If applicants and employees are forthright (and remember to report) then employers may learn what they want to know through 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. Hence, employers may turn to other sources. 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 most of the rest of the community) might never have known about absent such publicity. Employers might also obtain information from "tips" from other applicants, other employees, and members of the public. Although the enterprise might simply receive those tips by chance, it might in fact have adopted a policy of systematically encouraging them (e.g., by rewarding those who provide the information).

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, etc.

Employers may also engage in systematic investigations of a variety of sorts. Private investigators may actually be engaged in very special circumstances. Individualized physical examinations by physicians are frequently used. 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.

Many of these screening devices probably have as high a rate of false negatives as I have earlier supposed exists for polygraphs. That is, many more are erroneously identified as undesirable than ideally should be from the employer's viewpoint. But, again, overkill may nonetheless be worth if 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 care plan than would non-smokers hired in their place, a substantial proportion of employee smokers is not likely to have higher health care claims than the average non-smoking employee who is hired instead. Indeed, many smokers are probably neglectful of their health and actually use health care services less than average (so long as they don't suffer from a grave illness). But a few smokers, not readily identifiable in advance, are likely to be very expensive. As a result,

for reasons indicated already, an employer might conclude that the best and cheapest thing to do would simply be to 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 same sort of false negatives problem does not arise.

IV. Employee-Privacy Objections

So far I have sought to explain why and how employers make decisions based upon people's off-work conduct. I turn now to 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 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. Most fundamentally, tort law imposes liability for intrusion. The core idea here 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 is where he has a reasonable expectation of privacy.

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 see (or hear), and second, to keep the would-be snooper both from knowing what the spied-upon is doing and in turn 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 them innocently came into the hands of the gossip-spreader and not through improper intrusion.

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 to others. Put differently, tort law’s rules suggest that we want people to have the autonomy to influence both their self-identity and their public-identity, and in order to do that they must be able to keep some aspects of their lives secret from others. Moreover, by being able to present to the world an identity that is different from that which would be revealed by your fully-exposed 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 – no matter 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 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 as 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. These substantive due process rights that the U.S. Supreme Court has identified are also based, I believe, on a fundamental commitment to personal autonomy and a toleration of difference. In the abortion and contraceptive rights area, that commitment is especially about the personal autonomy to control your own body with respect to reproduction. But in the cases where parental rights with respect to their own children are protected, we see that 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 figure out and 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 what conventionally are considered to be private places (although some of it clearly is). 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 much the same as that 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 much the same as that put forward by Charles Reich in his justly famous writings about “The New Property.” 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 then broadly do as you like. In short, traditional 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 in that sense 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.

In principle, these new forms of property could be created and distributed with as little interference with 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 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 the new property only if they surrendered both their sexual and reproductive freedom (e.g., the rules forbidding sexual relations outside of marriage and having additional children) and their freedom to

retreat to a private place where they could generally act as they wished (e.g., the “midnight raids” on the homes of welfare recipients).

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

Reich’s call, then, was to reject these attached conditions, certainly 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 at all employers, whether private or public. Yet again the underlying sentiment is similar.

Moreover, nowadays, for most people, their most important capital 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 on their own 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 will see later, this difference may make all the difference in the world 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 I have discussed here – 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. Searches by public officials are permitted by the Fourth Amendment, if they are reasonable. Not all intimate private

conduct is now constitutionally protected, such as homosexual conduct. And parental autonomy with respect to children is plainly circumscribed by abuse and neglect laws. Hence, so too, it might well be desirable that some, but not all, personal lifestyle decisions be 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 the off-work conduct as an indicator – as a rule-of-thumb 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, this is a completely consensual love affair; or that while some embezzlers are recidivists, he 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. The underlying claim is that you are not treating me as a person, that you are showing no respect or concern for me as an individual. Instead you are treating me like a statistic, as part of a group to which you have involuntarily assigned me.

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. It is, more generally, part of the demand for due process and individualized treatment that we see throughout the law in recent decades. To be sure, 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 "you not only don't 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 should be their private business and no business of their employer's, once the employer starts making off-duty conduct its business, this generates yet an additional twofold 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, that the collection and storage of this information sometimes creates a significant risk that private information will be revealed to those who have absolutely no business knowing about it.

Smokers, for example, may object not only to the employer's interference in what they are allowed to do at home (if a firm won't hire smokers), 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, since, for them, of course, 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 get in the employer's files?

The same goes for drug testing. Many people may be highly offended by having to urinate in front of a test-giver, especially those employees who know they aren't drug users and so there is nothing bad for the employer to learn about them through the test (unless, worse, it yields a false positive). 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 the employer to penetrate too far into the private realm of the person forced to undergo the testing ordeal, coercing the revelation of matters (including matters that the employer, in the end, doesn't really care about) that the subject believes should be shielded from other people's knowledge (such as their religious and sexual behaviors and beliefs that are often probed in psychological tests, not so much for the specific answers provided, but rather for the pattern of the interviewee's responses).

Notice how the collection methods themselves vary in their offensiveness. Blood and urine tests (and the way they are carried out) are probably more bothersomely invasive to most people than are breath or saliva tests; cross 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, people are generally more worried about it getting around 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 these harms 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 eager for the employer to know 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. As I see it, fundamentalists want to have employee privacy protected in a way that is broadly analogous to the way that free speech absolutists seek to protect free speech. That is, privacy fundamentalists would favor a very strong presumption that workers' interests in their personal autonomy off the job should trump employers' economic justifications for restricting private life.

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 theater or saying "fighting words" that clearly threaten to provoke violence – may be restricted. So, for example, 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; and perhaps they would concede that employers could base negative work decisions based 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 acceptable employer decisions based upon off-duty behavior.

Privacy pragmatists are those who take a less absolutist approach. Those in this group would put a lot of 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 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 some nexus between the criterion employed and the employer's interests. As I see it, 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) is that many people may be punished for, or discouraged from, exercising their freedom to act as they 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 will 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 and those of the employee. The concern of privacy pragmatists remains, however, that too many employers left on their own will draw that balance in an inappropriate way that devalues the employee's personal autonomy.

Why does 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 well 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. To be sure, there may be other ways to classify applicants for life insurance 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-African-American applicants who are offended by the practice, the "efficient" thing for in individual insurer to do may well be to price by race. And, because this classification

practice would lead to relatively lower costs for whites, it seems reasonable to doubt that many whites would put principle ahead of pocketbook and refuse to deal with the insurer on account of such a pricing strategy. Moreover, once one insurer does it, this gives other insurers a strong incentive to adopt the same practice, for if they do not, they risk earning lower profits. This is because, if they charge all of their insureds, black and white, what their competitors charge whites, 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 other firms.

But what might be thought “efficient” for the insurance industry fails to take into account the interests that individual African-Americans desiring to buy life insurance have in not being singled out on this basis. 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 explicitly making things worse for them because they are 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 the society at large to try 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 mechanisms to turn away riskier African-American business – perhaps through more subtle means, such as by deciding to locate their agencies in places inconvenient to black buyers.)

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. 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 overrode the proposed policy, he presumably was saying that, at least in his judgment, from the overall social perspective, the benefit to the Marines would have been more than offset by the undesirable consequences for married people.

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 would be equally unacceptable to have African-Americans as a class be paid less by employers for the same job on the ground, say, that it could be statistically shown that blacks had been/are likely to be less productive in that job. And, presumably, by the same token, President Clinton would also have blocked a proposal by the Marines to pay single enlistees more than marrieds 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 these costs of his private behavior, sometimes it is simply not practical to do so. Hence, as a practical matter, the employer may well 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 an inevitable one. For example, an employer just might be able to figure out 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 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 the U.S. today. Having smokers pay more is perhaps another matter. For now, however, I simply want to say again that although some privacy pragmatists might be willing to tolerate this sort of cost internalization in certain circumstances, privacy fundamentalists would surely not accept such cost internalization by employees.

This discussion also suggests where, on a continuum, as we move away from privacy fundamentalists and privacy pragmatists, we may find those with yet other viewpoints. 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 not only would they find it unobjectionable if someone had to pay more for employee group health insurance or had to suffer lower wages because of his off-duty behavior, but 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 all be thought 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, to emphasize the point, 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 people's list 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 they oppose, but also they may affirmatively endorse and encourage employers to discriminate against such people, and applaud 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 a few years back of a large Baptist group to call on its members to boycott Disney products and services was, in important respects, based upon objections to some of the people Disney employs in producing its entertainment products.

Put more broadly, people at this end of the continuum are probably the 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, gender, national origin/ancestry, religion and disability?

As already suggested above, some may reject the analogy because race, gender and ancestry/national origin are generally understood to be matters of status, that is, a characteristic that is essentially unavoidable by you. By contrast, the lifestyles at issue here are generally understood to be matters of choice. In other words, if the central idea of the existing civil rights laws is that it is unfair to receive worse treatment on account of factors about yourself over which you have no real control, that claim hardly applies to lifestyle discrimination.

Discrimination on the basis of disability and religion introduce complexity to this dichotomy, however. After all, 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 that fact. For example, people who carelessly disable themselves by knowingly taking unreasonable risks of harm to

themselves are nonetheless disabled and hence entitled to invoke the law's protection. In short, their voluntary choice is somewhat akin to the choice to lead a certain lifestyle. Still, perhaps something of the distinction may be preserved by noting when disabled people present themselves for work, for example, they are generally no longer in a position to retract any earlier choice they may have made and make themselves able-bodied once more. By contrast, speaking generally, many workers can still change their lifestyle (albeit at what might be a very high cost to themselves) 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. Most people would say that you can, at any time, abandon your religious belief, or adopt a new one. In this respect, religion is perhaps even closer to lifestyle. Indeed, I would say that the practice of one's religion is a lifestyle. On the other hand, I will concede that religion also has some status aspects. For one thing, people tend to have their religion given to them by their parents, which means that, initially at least, it is effectively imposed on them. By contrast, most of the lifestyle choices at stake here are the product of deliberate adult decisions, at least if we don't go too deep into the psychological underpinnings of people's choices. For another thing, many people have a specific religious label attached to them, regardless of their personal beliefs. This is clearly the case with a high proportion of "Jews" and surely for a large number of "Catholics" as well. That is, often others will consider you and treat you as Jewish or Catholic even if you are a non-believer or even have embraced a different faith. In such circumstances, religion is, in effect, a version of ancestry and not choice. In short, I am suggesting that, with a little bit of ingenuity, perhaps disability and religion can be shoe-horned into the "status" category after all.

And yet, a wider perspective makes clear that "status" alone can't explain why certain things are covered by existing laws and other things are not. For example, note well that 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 now 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 forbidden by our core civil rights laws need to find a common feature that can overcome this rough status-choice divide. The way to try to do this, I believe, involves two steps. The first 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 at the end). The second, and most important, intellectual 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, gender, 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 quite that same as what lifestyle discrimination is all about. Lifestyle discrimination is more about individual autonomy. And yet, individual members of traditionally advantaged groups are, in some respects, making much the same claim as those seeking lifestyle protection – treat me as a person. To the victim of lifestyle discrimination, it may well also feel like irrational bigotry.

In this way, some employment decisions based on certain types of off-work behavior may seem a lot like mistreatment because of religious beliefs. These days we generally don't tolerate people grouping 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 way we have concluded that employers have a duty to accommodate the

disabled, even at an extra cost to the employer). In short, how strongly do we value privacy after all, and how wrong 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 "extremists" and "pragmatists" individual Americans will feel differently about the different privacy matters at stake – for example as 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 aren't (perhaps smoking or engaging in kinky sex).

V. Existing Legal Regimes

Having explored employee privacy interests in being protected against lifestyle discrimination, I turn now to a consideration of how those interested might be protected by the law, first describing existing legal regimes and then in Part VI by exploring a typology of alternatives.

A. Broad Limits on Lifestyle Discrimination. In less than a handful of states – two, or arguably three – legislatures in 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.

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. The irony I refer to is that Colorado is the state which had earlier passed (albeit by popular initiative) a specific rule designed to permit employers to discriminate against gays and lesbians. This rule was then overturned by the U.S. Supreme Court, but there seemed to be no widespread 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. They are: legal recreational activities, consumption of legal products, political activities, and membership in a union.

The question of just 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. In the other case, a female

employee persisted in dating a former employee who went to work for a competitor and was discharged. Seeking protection of the statute the workers in both cases rather cleverly argued that dating is a recreational activity and hence covered by the New York law. The two lower courts have split on the question.

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 one or another specific forms of off-duty conduct from being used to make employment decisions.

Legal Products. Perhaps the broadest of these statutes, which seven states have enacted, forbids employment discrimination against those who consume legal products off the job. This rule (which mimics a portion of the New York Law) is actually an expanded version of far narrower rule that applies altogether in about half of the states – forbidding discrimination against smokers. One of the “legal products” states, Texas, is in between, since its law focuses specifically on tobacco plus alcohol. As of this writing, there is no reported litigation under any of these statutes.

Smoking. “Smokers’ rights” laws swept through more than two dozen legislatures in the early 1990s as a result of the combined lobbying of the ACLU and the tobacco industry. These laws were provoked primarily by reports, noted above, that a significant number of firms already refused to hire smokers and fears that the trend was fast growing. At the urging of the ACLU and others, once smokers’ rights proposals got into in the legislative process, they were broadened in some jurisdictions in the ways already noted – to cover alcohol, to cover all legal products, to cover lots of other 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 just under half of the states, including Colorado and North Dakota whose more recent broader statutes might well cover this ground as well. 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 you are not being discriminated against merely because you are married (which the statute would bar), but rather because of who your spouse is (and which, they say, is not an illegal basis for employer decisions). Similar ambiguities 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. Much 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.

As noted above, Colorado's general statute has been interpreted to cover discrimination on this basis, as presumably North Dakota's would be. It is unlikely, however, that New York's rule on recreational activities would be so interpreted.

Politics. A very large number of states have laws concerning the rights of workers to involve themselves in politics and still retain (or obtain) their job. But these laws are by no means the same from place to place. Moreover, some of them 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.

Connection to the Criminal Justice System. Some states forbid employers from discriminating on the basis of a worker's arrest record. Rather more state laws prohibit employers from asking an applicant about his or her arrest record. Probably workers would be best protected by a combination of those two rules. This is because 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 other than by asking the employee directly (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 or on the basis of any misdemeanor conviction more than five years in the past. California singles out conviction for possession of marijuana as a forbidden basis for employment discrimination.

Going even further, five states broadly prohibit public employers from engaging in criminal-record discrimination – i.e., on the basis of arrest or conviction. 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. Behind the laws of all of these eight states is a policy of trying to enable ex-cons to become employed. After all, if someone serves his time in jail or prison and then can't get work, this may well head him back to a life of crime. But if most employers simply decide not to take a chance on ex-cons, their opportunities of finding work are small.

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.

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, gender and the like. In that case it will typically follow that 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.

So, too, under the stand-alone provisions the question 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 so on.

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; gender discrimination claims have been asserted against anti-nepotism policies that have had an adverse impact on women; and disability discrimination laws have been argued to cover smokers, those with high blood pressure and the like who are denied jobs on these health-related grounds. Yet, if autonomy as to off-work conduct is the real objection, then existing core civil rights laws simply will not do the trick. Moreover, these laws might be stretched to help some deserving claimants and yet fail to protect other equally deserving claimants.

Defenses. Although I have so far described the various laws noted above as generally prohibiting discrimination on one basis or another, in fact, many of them contain specific defenses which employers may sometimes be 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, or religion or gender, then there is only the very narrow defense that in this very special instance the gender, religious or ancestry requirement is truly a “bona fide occupational qualification.” And ordinarily, this defense will simply not be available.

Three other points deserve attention as well. One, disability discrimination, in effect, is allowed if the disabled person is asking for more accommodation than it is reasonable to ask the employer to do in order to make the workplace suitable for the disabled person. Hence, employers are permitted to avoid what are viewed as excessive costs of affirmative action that would help the disabled. Two, race and gender 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. In response to such a showing, the burden of justifying the resulting employment pattern shifts to the employer. Although Congress and the Supreme Court have at various times somewhat 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 practices in question. Three, 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. All of these issues deserve attention when adopting statutory regimes dealing with lifestyle discrimination.

As of now, it seems unlikely that very 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 describe 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 the asking of certain questions of applicants, although this too is difficult to police and, often, employers could find out the information they seek from other sources. Such law evading tactics would, in turn, lead some to call for the use of disparate impact litigation in response.

In any event, it is worth noting in the sweeping Colorado lifestyle discrimination law also contains generous defenses for restrictions that (a) are reasonably/rationally related to the employment activities of a particular employee, (b) constitute a bona fide occupational requirement, or (c) are necessary to avoid a conflict of interest or the appearance of conflict of interest. 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. New York's provides a defense for activities that create a material conflict of interest. Based upon some even more specific provisions in the narrower smoker's rights laws enacted during the same time period, it seems clear that, although those legislatures didn't want most employers refusing to hire smokers, at least some of them felt differently about employers such as 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 often been more a matter of lower workers' compensation costs than an ideological objection to products that start so many avoidable fires that has motivated such fire department policies).

D. Employment other than "at will": No discharge without "cause." The traditional American default rule is that workers are employed "at will." Their

“contract” right to continued employment may be terminated by their employer at any time – as is commonly said, “for any 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 also 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 make the rule become: you can be denied employment “for any 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 being unilaterally dismissed at their employer’s discretion. These employees are primarily in three categories: 1) unionized workers, 2) those government employees who are not unionized, and 3) 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.” 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 aren’t singled out, respectively, because of their union activities or because they aren’t in favor with elected political officials. Nevertheless, the critical thing for our purposes here 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 employer wants to let the worker go because of his or her behavior outside of work, the employer can be made to justify that behavior as constituting good “cause.”

Disputes under these provisions are generally handled by arbitrators in the union context and by hearing officers in the non-union public setting. 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). Routinely, decision-makers say they are looking for the nexus between the employee’s conduct and the employer’s

concerns. This implies that some off-duty conduct is too remote to the employer's legitimate interests to be the basis of an adverse employment decision.

I sense, however, that in the application of the "nexus" test, these decision-makers reach inconsistent conclusions in close cases. Since, as I have already explained, 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.

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 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 are competitive with the employer.

Note well that the collective bargaining, statutory and individual contract provisions just discussed apply only to employees. Hence, they afford no legal rights to applicants. On the other hand, collective bargaining agreements do sometimes include pledges by employers not to discriminate in certain ways in the hiring process as well, although these pledges have not generally been concerned with lifestyle discrimination.

This section should make it clear, 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, for now at least, that change does not seem in the offing. "At will" employment has been criticized by many scholars, various task forces, and so on. It is not the rule in Europe, for example. Yet, for the present, only Montana of all the United States has replaced it, and there is little reason to believe that other states will soon add to the list.

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. 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.

Other federal constitutional protections that public employees may claim with respect to their off-duty conduct are Fourth Amendment privacy claims, due process claims etc. 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.

F. Protection against “wrongful discharge.” In recent times modest inroads have been made on traditional contract law rules covering employment. For one thing, in many states it is now possible to demonstrate that one has an individual employment contract even if there is no specific contract in writing. Instead, this contract is implied from the parties’ ongoing relationship. If someone is abruptly and arbitrarily fired who has such a contract, this is a form of “wrongful discharge” and the worker is entitled to sue.

Primarily, these lawsuits have been brought by long-term employees, often rather highly paid, and into these implied contracts are also implied “cause” requirements for dismissal. 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. These cases are perhaps best understood as arising under tort law rather than contract law. Basically, this idea is the some courts imply an obligation of “good faith and fair dealing” between employer and employee. So, if the employer acts in a clearly wrongful way towards the employee, this may subject the employer to liability. Moreover, the damages awarded here 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. A good example is where the employer asks the employee to lie to government officials about some tax cheating or other criminal behavior the employer has been engaging in. Suppose the employee refuses and is fired. This would be a “wrongful discharge” (at least in states that recognize this sort of cause of action). The central idea is that employers ought not be able to condition employment on getting employees to behave in that way.

For my purposes here, therefore, the issue is the extent to which employees may bring this sort of wrongful discharge claim in situations where they have been fired for their off-duty conduct. Doctrinally, my sense is that this category is, or is meant to be, reserved for cases in which the employer’s demand with respect to the employee’s out-of-work time is rather outrageous. For example, I could see providing an employee a wrongful discharge claim where, as mentioned earlier, the employee was fired for taking boarders into his home of a different race. Examples of actual wrongful discharge cases along these lines are difficult to find, however.

VI. A General Taxonomy of Ways to Resolve Lifestyle Discrimination Disputes

Part V 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 I earlier ascribed to those I termed “privacy minimalists.” The idea here is that workers who don’t like employer intrusions into their private lives will choose to work for someone else – an employer who doesn’t seek to control their off-duty behavior, at least not the specific behavior they wish to engage in. This solution means that the law would simply 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 core argument for this solution is that society should count on the power of workers to vote with their feet, combined with the desire of employers to attract and keep good employees to discipline employers from making 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 assume that consumers and other employees will also bring economic pressure to bear on employers whose privacy-invading conduct violates

community norms. Moreover, I believe that this approach implicitly assumes that certain employees whose off-duty conduct may impose costs to employers will tend to be sorted into those jobs where the costs are least, arguably to the mutual benefit of employers and employees.

Two other arguments may also be made for the market solution. The first is that the problem of lifestyle discrimination is, in the bigger picture, not a terribly serious one (i.e., not pervasive) and hence 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. (I will say a bit more about this claim at the end.)

A second argument is that lifestyle discrimination laws are not likely to be very effective. Part of the claim here is that formal rules against lifestyle discrimination will frequently drive such practices underground; that is, employers will still discriminate, but no longer so openly – a possibility noted earlier. This, in turn, may make it very difficult for employees, and typically nearly impossible for applicants, to determine and prove that they were indeed discriminated on the basis of their private behavior (and combating that problem may then require the use of disparate impact litigation of the sort already discussed).

Moreover, since it would be easy to make a claim of lifestyle discrimination, it may be argued that creating a legal right is likely to 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 gets the impression that too many incompetent employees are resorting making this sort of claim as an excuse, this could even give the entire problem of lifestyle discrimination something of a bad name.

Shortly, I will present the other side – which finds leaving the problem to the market highly problematic. Before I do that, however, a second solution should be discussed.

B. Contract. This second solution is something of a variation on the first. The focus here is on the notion that employees and employers will 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 people’s willingness to work under various conditions by unilaterally setting policies about off-duty conduct that best assure they will attract and keep the workforce they want. From the employee side, the “remedy” in the face of unacceptable conditions is to refuse a job or to leave a job.

By contrast, here the idea 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. In short, this solution imagines direct haggling between workers and employers over the extent to which 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 the deal they make with their employer.

For the overwhelming majority of employees, however, it is hard to imagine how, as a practical matter, this solution could be operational zed apart from collective bargaining on behalf of all (or at least most) employees in the enterprise. And, of course, in the American context surely, that has meant via unionization. In other words, it is generally implausible for employers to work out deals with individuals. Not only would the transactions costs be very high, but also having different regimes apply higgly-piggly to different employees threatens to create an enforcement nightmare in enterprises of any size at all.

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

As for the more unusual individual employment contracts for higher paid employees, there is the possibility of giving specific attention to off-work conduct. From what I have been able to tell, those employees rarely seek to have employers agree that certain specific off-work behaviors of theirs are to be allowed. Rather, it would seem that it is the employers who are much more likely to insist that employees not engage in certain off-work behavior. The employee with such a 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 provide a lump sum to get out of the contract.

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

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.

As we saw in the prior section, such protections could be of very different sorts.

1. Protection against outrageous conduct

This is perhaps the minimum protection that might be envisioned. It would only bar lifestyle discrimination in employment when the community finds such discrimination outrageous. This sort of privacy right would most likely be implemented through bad faith tort claims. Exactly what sorts of lifestyle discrimination would be in this category is altogether unclear, however. Perhaps President Clinton concluded that refusing to hire someone because she/he is a parent is in this category. Presumably specific sorts of discrimination that would qualify for this cause of action would be decided over time by judges and juries through traditional common law processes.

2. Protection against unreasonable conduct generally (i.e. “for cause”)

Stronger protection would come through statutory “for cause” protection against discharge as a general matter, although, conceivably, a more restricted “for cause” rule governing discharges for off-work behavior could be adopted. This is the sort of right – covering at-work as well as off-work behaviors – is what public employees in the U.S. now have and it is a right that most employees in Europe and Japan have today.

3. Civil rights protection against lifestyle discrimination generally

This, on the face of it, is the Colorado and North Dakota solution, which (at least initially) gives workers the same sort of protection against any sort of lifestyle discrimination as they have with respect to discrimination on the basis of race, gender, religion and so on.

A strong civil rights approach adopts the general position that it is employers who have to internalize the costs associated with employee privacy and not employees themselves. This means, among other things, that assertions that other employees or customers don't like the off-work behavior in question and might not deal with the employer are simply disregarded.

Of course, as we have seen, strong civil rights-like protection could be given to specific off-work conduct, instead of all such conduct (or at least all such legal conduct).

Yet it must be recognized, as discussed above, that such protection could be seriously compromised by rather generous defenses – especially those that focus on the reasonable business interests of the employer. Such defenses could, in the end, convert what appears to be a civil rights-like statute into something that only protects against outrageous behavior by employers.

VII. 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. Women, although not a minority by head count, also needed the support of enough in the political majority with power (i.e., men) to gain protection. 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 don't view themselves as direct personal beneficiaries of the law. These citizens probably support anti-discrimination principles primarily because they believe such rules are just (and perhaps because they believe that failure to adopt such rules will unleash other forces that will make their lives and perhaps society in general worse than it is at the time the anti-discrimination rules are proposed).

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 – e.g., smokers, swingers, hang gliders, drunk drivers, offending political protesters, and the like. While others are not in the minority – e.g., parents or marrieds – 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.

The point, then, is that 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 – e.g., by saying that *all* legal off-work behavior is to be protected 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.

A further point to note is that were those I earlier termed “coercive social norm setters” few in number, or at least were they not so insistent in condemning certain private conduct, then employers would probably not be reacting to employee off-work behavior the basis of their concerns about the reactions of their customers or employees (although employers would still have other financial concerns triggered by off-work conduct). This means that the more tolerant we are as a society of other people’s private conduct, the less lifestyle discrimination there would be (other things equal). But at the same time this also means that the very existence of coercive social norm setters makes it likely that there will be some concentrated opposition to lifestyle discrimination protections, at least where they focus on behaviors that the norm setters dislike.

All of this, of course, assumes a rather simple model of the political process. And we know that in the real world special interest groups can sometimes achieve political gains against the diffuse wishes of the majority, and that 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 political future of lifestyle discrimination laws is very difficult.

Historically, the existing legal provisions seem to have been the product of special moments in which an issue surfaces in a way that generates the needed political support at least in some states. 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. When it began to be clear that some smokers were being denied jobs for smoking away from work, this galvanized political actors to come to their defense. Perhaps unsurprisingly, the leaders in this effort were the ACLU on the one hand and the tobacco industry on the other, as individual smokers themselves were not already well organized (unlike gun owners through the NRA). Perhaps it is also not surprising that, at least in several states, when presented with claims on behalf of smokers, legislators expanded the sweep of the laws enacted. The history of statutory protection on the basis of marital status and of sexual orientation seems somewhat analogous.

This suggests to me two possible future political scenarios that could lead to the enactment of new lifestyle discrimination laws. One, the rules will remain as they are today until some event or series of events next galvanize 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. Two, the rules will remain as they are today until some political forces generally supportive of employee off-work privacy organize a campaign broadly to protect that privacy. Although labor unions might 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 how a fight for even stronger protection would become a high priority issue for most unions. Other civil rights groups that care a great deal about privacy might also organize such a campaign, but it is not clear who those groups really are, apart from the ACLU. And in any event, those interested in employee privacy can be easily distracted to 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, it seems to me that, for the lifestyle discrimination issues I have raised here to become a hot, 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. Whether it actually is such a problem is not clear, however. In order to try to begin to understand this issue, I have been able to obtain all of the claims that were filed during one year following the adoption of a 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. While this not the place to describe in detail what I have learned from those filings, I will at least note in closing that there were perhaps 50 complaints filed from across the entire state that year about matters that might be fairly

viewed as lifestyle discrimination. As we gain more experience with the law, it should be possible to determine more clearly a) whether that number is changing (and in which direction), b) the general nature of the complaints and is that changing, and c) to what extent are the complaints valid and in such cases the extent to which employees are gaining satisfactory relief.

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