Life Away From Work

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I. INTRODUCTION

Has an employee a right to a life away from work? The answer our common law gives is a categorical “no.” An employer is free to condition employment on the employee’s not doing all manner of things off the employer’s premises and on the employee’s own, non-work (and non-paid) time. This prerogative is a legacy of the nineteenth century’s translation of the law of domestic service, of master-and-servant, into the industrial setting; which idea of prerogative was carried over into the “at will” employment rule adopted by the judiciary in the second half of the nineteenth century.¹

In an archetypical case, Payne v. Western & Atlantic Railroad Company,² the Tennessee Supreme Court confronted whether a commercial tort was worked by a railroad superintendent’s order directing the railroad’s workers not to shop at the plaintiff merchant’s store. The court addressed the order in these terms:

May I not refuse to trade with any one? May I not forbid my family to trade with any one? May I not dismiss my domestic servant for dealing, or even visiting, where I forbid? And if my domestic, why not my farm-hand, or my mechanic, or teamster? And, if one of them, then why not all four? And, if all four, why not a hundred or a thousand of them?³

From this premise, the conclusion was inexorable:

[M]en must be left, without interference to buy and sell where they please, and to discharge or retain employees at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act . . . . ⁴

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2. 81 Tenn. 507 (1884).
3. Id. at 518.
4. Id. (emphasis added).
The railroad workers made subject to the superintendent’s order were not to be thought of by the law as free men, to be “left without interference to buy” where they pleased; they were thought of as being in tutelage to their master, like children.

The exercise of the prerogative the at-will rule accords has become hedged 'round by a crazy quilt of positive law, state and federal. Almost half the states prohibit employers from interfering with their employees’ vote in elections, but only a handful assure employees the right to engage in political activity. Even as associational life may be subject to an employer’s dictate, an employer may not interfere in one’s right to join a labor organization, a church, or to associate with the statutorily disabled. More than half the states have legislated with regard to an employee’s consumption of lawful products: fifteen protect the right to consume tobacco or alcohol and seven protect the right to use any lawful product. New York has legislated to protect engagement in recreational activity, and three states protect engagement in any lawful activity; though these laws also allow employers to regulate where an adequate nexus to the workplace can be shown. A few states, carrying forward company store prohibitions of the last century, allow for commercial freedom, generally insulating the employee’s choice of where to shop, rather than what to buy. But, absent positive law, the employer is free to restrict private life as it will.

Last year, I placed these “lawful activity” laws in comparative context, drawing primarily on the law in France and Germany. These jurisdictions refuse to pay obeisance to the catchphrase of “freedom of contract” when they know very well that the contract

5. These are cataloged in Matthew Finkin, Privacy in Employment Law 368–69 (2d ed. 2003) [hereinafter Finkin’s Privacy]. New York should be added to this group. N.Y. Lab. Law § 201-d(2)(a) (2006).
9. Finkin’s Privacy, supra note 5, at Pt. II. These are very largely the product of successful lobbying by the tobacco and alcohol interests.
12. Some of these are set out in Finkin’s Privacy, supra note 5, at 425–26.
13. Finkin, supra note 11.
is one of adhesion in which the employee usually has rather little or nothing to say.\textsuperscript{14} Nor do they genuflect autoreflexively to managerial prerogative, for it is the function of the law in these jurisdictions to assure that the exercise of that prerogative stays within socially acceptable limits.\textsuperscript{15} Thus, the French Civil Code guarantees each person a right to respect of his private life;\textsuperscript{16} and the French Labor Code allows only those restrictions on liberty as are justified by the nature of the work and proportionate to that end.\textsuperscript{17} The \textit{Cour de Cassation} has read "private life" expansively, to the point where, as some critics have argued, the distinction between personal life (\textit{la vie personnelle}) and the more intimate or sensitive matters of private life (\textit{la vie privée}) has judicially been collapsed.\textsuperscript{18} The \textit{Cour de Cassation}, for example, has denied enforceability of a contract clause requiring an employee to move his domicile, that is to move his wife and family, in conjunction with a transfer: the provision was not necessary for his presence at the new location and it unduly disrupted his right to family life.\textsuperscript{19}

\begin{itemize}
  \item[14.] A French commentator lists the contract of employment (\textit{contrat du travail}) under contracts of adhesion (\textit{les contrats d'adhésion}) along with contracts of insurance, for the supply of gas and electricity, and public transport. Georges Ripert, \textit{La Règle Morale dans les Obligations Civiles} 97 (4th ed. 1949). See generally Aline Vallée, \textit{Le Consentement dans le Contrat de Travail} (1930) (placing that issue in comparative context).
  \item[16.] C. Civ. art. 9 (Law No. 70-643, 17 July 1970): "Everyone has the right to respect of his private life." ("Chacun a droit au respect de sa vie privée.").
  \item[17.] Labor Code art. L.120-2 (Law No. 92-1446, 31 December 1992): "No one may place restrictions on the rights of persons or on their individual or collective liberties unless they are justified by the nature of the work and proportionate to the goal sought." ("Nul ne peut apporter aux droits des personnes et aux liberté individuelles et collectives de restrictions qui ne seraient pas justifiées par la tâche à accomplir ni proportionnées au but recherché.").
Germany lacks a labor code, but the labor court system has generated a body of decisional law that a popular legal treatise summarizes in this way:

Off duty time must remain at the workers' disposition alone . . . . They can choose their circle of friends, can marry whomever they choose if and when they will, can go in for sports, loaf, go for walks, pursue hobbies—whatever appears meaningful to him or her.\(^{20}\)

The few American states insulating the employee's private engagement in lawful activities seemed to me to embody an analogous conception of the balance to be struck between employer control and private life.

After those remarks were delivered, however, a broadside was published not only against "lawful activity" laws, but against the laws insulating the consumption of lawful products from employer dictate as well.\(^{21}\) The attack is worthy of extended discussion in the following sections, not because its arguments are legally or philosophically novel or especially sophisticated, but for quite the opposite reason: it is worthy of consideration because it perfectly captures American managerial ideology, i.e., a set of beliefs that simultaneously explain and justify the status quo.

II. THE CRITIQUE

The authors essay three grounds as arguably justifying these laws: (1) a "pro-privacy" libertarian philosophy that "employers have no business intruding into the 'personal lives' of employees"; (2) a desire to limit employment decisions to a "business-related or performance-related justification"; and (3) a "desire to separate the work and off-work zones and draw a bright line between them." Fair enough. But however "compelling" these "philosophical reasons" may be, the authors argue that, for three reasons, these


laws are nevertheless a "bad idea." First, they further "no particular public policy interest." Second, they substitute the courts for the employer in the making of decisions that the employer, not the courts, is best suited to make, i.e., that the "particular off-work activity is related to [or sufficiently related to] the employee's work or the employer's business objective" to justify the constraint. To nail this argument down they set out fourteen hypothetical cases where an employer would be justified in imposing a constraint but where the authors fear a contrary judicial decision. In fact, they argue that an employer should be able to act in these cases preemptively, i.e., in the absence of any manifest harm to the business. Third, these laws work an "unnecessary" erosion of and intrusion into the at-will rule, which qualification recapitulates their arguments: legislation is unnecessary because no public interest is served; because the employer can be trusted to strike a sound balance between business need and employee autonomy; and because of the sacrosanct quality of the at-will rule. This last boils down to a tautology: an erosion of management's right to discharge at will erodes management's right to discharge at will. It need not detain us. Let us then take up the other two.

III. THE CRITIQUE UNPACKED

A. The Want of Public Interest

Contrary to laws prohibiting discrimination on invidious grounds—first, race and sex, later age, and more recently disability—in which the authors concede the public interest, the argument here is that the public has no interest in the orders an employer gives to its employees so long as the employer is not commanding them to do an unlawful act. The argument, deeply rooted in laissez-faire, prompts the necessary follow-on: how

22. Id. at 34.
23. In the last quarter of the nineteenth century, about 17% of the labor market were employees classified as in domestic service. Historical Statistics of the United States, Colonial Times to 1970, D11-75 at 127, D167-181 at 139 (1975). Domestic servants complained bitterly of working conditions: excessive hours, the loss of dignity, and the monitoring of private life. They sought to unionize. David Montgomery, The Fall of the House of Labor 147–48 (1987). They sought protective legislation. David Sutherland, Americans and their Servants 178–80 (1981). But, as the leading reformer of the period, Lucy Salmon of Vassar College, observed in her "landmark monograph" (Sutherland's characterization, id. at 166):

He [the employer] considers that neither his neighbor nor the general public has anymore concern in the business relations existing between
should the legislature be guided in deciding whether the public interest justifies a constraint on freedom of contract? Given the historical taproot of the authors’ argument, the answer might be found in the way the courts thought about the problem during the period when the at-will rule was created, when deference to private ordering was at its height.

In 1899, the Tennessee Supreme Court confronted the state’s truck law, applied in that case to forbid a coal mine from paying its workers in bushels of coal. The system of payment may or may not have worked a reduction in the cash value of the promised wage; that would depend on market conditions and the astuteness of the employee in anticipating them. In the event of a persistent depression in the market price, i.e., of the real wage, the employee was at liberty to renegotiate the terms or to seek employment elsewhere. Was any public interest served in the legislature’s intrusion into the way the parties agreed wages would be paid?

The court observed that: as the power of the state encompassed the enactment of such laws “as may rightly be deemed necessary or expedient for the safety, health, morals, comfort, and welfare of its people,” the power to define the public interest “must be expected and allowed to expand, and take in new subjects from time to time, as trade and business advance, and new conditions arise.” In this, the Tennessee court echoed the U.S. Supreme Court the year previous: the law must adapt “to new conditions of society, and, particularly, to the new relations between employers and employees, as they arise.” What of the fact that the employer’s wage payment policy was agreed upon, at least in form? “[T]he fact that both parties are of full age, and competent to contract, does not necessarily deprive the state of the power to interfere where the parties do not stand upon an equality.” Herein lies the public interest: to place the employee himself and his domestic employees than it has in the price he pays for a dinner service or in the color and cut of his coat.

Lucy Salmon, Domestic Service 122 (2d ed. 1911).


26. Holden v. Hardy, 169 U.S. 366, 387, 18 S. Ct. 383, 390 (1898). Note that it took a century after the Thirteenth Amendment for the body politic to find the public interest to be implicated in private acts of employment discrimination, which public interest our authors do not now question.

and the employer "more nearly upon an equality. This alone commends the act and entitles it to a place on the statute books...."²⁸

If this is so of wages, would it not be so of commercial liberty as well? Sixteen years later, the Supreme Court of Tennessee repudiated the holding in *Payne v. Western & Atlantic Railroad Company* to allow that a commercial tort could stand on the facts that had been asserted in that case²⁹ and, in so doing, it endorsed this statement from the dissent in *Payne*: "It is argued that a man ought to have the right to say where his employees shall trade. I do not recognize any such right. A father may well control his family in this, but an employer ought to have no such right conceded to him."³⁰ There is more: the freedom allowed employers by the *Payne* majority, said the dissent, permitting them "to require employees to trade where they [the employers] demand," will allow them as well to require employees do anything not strictly criminal that employer may dictate, or feel the wrath of employer by dismissal from service. . . .

Capital may thus not only find its own legitimate employment, but may control the employment of others to an extent that in time may sap the foundations of our free institutions. Perfect freedom in all legitimate uses is due to capital, and should be zealously enforced but public policy and all the best interests of society *demands it shall be restrained within legitimate boundaries*, and any channel by which it may escape or overleap these boundaries, should be carefully but judiciously guarded.³¹

In sum, the public interest in these "lawful activity" and "lawful product" laws is evidenced in the critics' very synopsis of what they call the philosophy underpinning them: to assure a better equality between employer and employee by giving content to what it means to society for persons to be free of control over their private lives; to give effect to the value people attach to engagement in non-work activities meaningful to them, even if only in the purchase of a consumable good; and, consequently, to cabin worklife from non-work—or private—life. These are taken up below.

²⁸. *Id.* at 960.
³⁰. *Id.* at 543 (citing *Payne v. W. & Atl. R.R. Co.*, 81 Tenn. 507, 542 (Freeman, J., dissenting)).
1. The Personal Meaning of Leisure

Philosophers (starting with the ancient Greeks), historians, sociologists, psychologists, and students of industrial relations have long explored the meaning of the conjoined concepts of work and leisure, even if the content of the latter is sometimes contested. As the sociologist Erwin Smigel pointed out, "recreation, amusement, fun, pleasure, play, hobby, idleness, free time and leisure are employed interchangeably" in common parlance. To the political scientist and philosopher Sebastian de Grazia, leisure is distinct from mere free time, and even more distinct from the pursuits Smigel catalogues. De Grazia would return to leisure as a specifically Greek ideal.

To others, the focus is less classical if no less categorical. "The defining feature of leisure," writes Joanne Ciulla, "is that it is intrinsically rewarding: we do something for the sake of doing it and because we like it. For those who have meaningful work, there is little difference between work and leisure." For those who find little or no meaning in work, for whom work is merely a means of physical sustenance, non-work activities may become the central focus of their lives. But in either case:

32. The literature is substantial. Some of the more salient of modern theoretical writing is usefully surveyed, if from the perspective of a question not much pursued today—whether the devaluation of work wrought by mechanization and the extreme division of labor incapacitates the regenerative role of leisure, especially when it, too, becomes as rationalized (or debased) as work—by Ben Seligman, Of Work, Alienation, and Leisure, 24 Am. J. Econ. & Soc. 337 (1965). The historical interplay between work and leisure in industrializing America is limned by Daniel Rodgers, The Work Ethic in Industrial America 1850-1920 (1974). This is picked up in the debate during the Great Depression by Benjamin Hunnicutt, Work Without End: Abandoning Shorter Hours for the Right to Work (1988).


34. Sebastian de Grazia, Of Time, Work, and Leisure (1962). Note for example, de Grazia's criticism of J.S. Mill's defense of "free time":

How will your free time be free if you have to be ready to go back to work on the dot, and if your free time is clocked too, and if in it you are reacting to your work—blowing off steam, making a whole article in your basement workshop, wearily watching TV. Work is still working on you. Your free time is two things: what your work permits and what your reaction to work dictates. The first is a licensed time; the second may be a licentious time; the third is leisure, conspicuous by its absence.

Id. at 272-73.


Leisure is free, self-determined, reflective, and gratifying. It is what you really want to do, when you want to do it. It is a time in which we do those things that are valuable to us and worth doing. Because leisure is a time when we are free, it is also a time when we are most ourselves. Without leisure we might lose track of who we are. Without leisure we may find it more difficult to make sense of our lives. 37

It may be that the potentially regenerative role of leisure—intellectually and spiritually—is debased by consumerism or squandered in what to some are meaningless (or, worse, work-like) pursuits. 38 To moralists of that persuasion, “free time” is a necessary but not sufficient condition for authentic leisure. 39 Even were the point conceded, it does not follow that that time should therefore be unfree, i.e., subject to another’s dictate, because that other—an employer or the state—finds the moral, regenerative, or other quality of the free time activity to be wanting. The need for play, more often expressed in leisure activities than in work (though for a fortunate few work is play, or playful), is inherent in human nature: 40 the greater the constraint on it the less human we become.

38. The case of organized sport is vexing from the viewpoint of whether or not it is spiritually or intellectually regenerative. It has been argued that participation in a game creates a condition of equality not encountered in the subordinating environment of work. Seligman, supra note 32, at 355–56. But Adriano Tilgher has argued that, “[m]odern sport is less and less left to the decisions and initiative of the individual, is constantly brought under the orders of rigorous rationalization just like modern work.” Adriano Tilgher, Homo Faber: Work Through the Ages 186 (1930).
39. The moral as well as economic arguments over American workers’ leisure is discussed in Rodgers, supra note 32, and Benjamin Hunnicutt’s Work Without End, supra note 32.
40. John Huizinga, Homo Ludens: A Study of the Play Element in Human Culture (1950). Richard Donkin, Blood Sweat and Tears: The Evolution of Work 327 (2001) (“Work and leisure are vital ingredients in the soup of life. They can run together as a fulfilling experience.”). Note that a leading “how to” book treats why amateur poker players play, the vast majority as a “leisure activity” with a circle of friends. It is:
[A] form of male bonding, as a night out, as a release of aggressions through the legitimated use of hostile and self-serving behavior that may be frowned upon in everyday pursuits, and as a controlled form of gambling in which skill plays a part while luck remains to explain or rationalize less than complete success .... All poker players are created equal, even if all do not prove equally skilled. Peter O. Steiner, Thursday-Night Poker: How to Understand, Enjoy—and Win 6 (1996). This, from one of the nation’s most distinguished economists.
2. Communal Consequences, or, Leisure's Externalities

The Australian scholar, Ronald McCallum, put employer controls over private life this way:

In a democratic society, working women and men require what I call "home space" to nurture their relationships and to parent their children; to engage in hobbies, recreational and sporting activities; for spiritual contemplation and reflection; to join clubs, churches, political parties, community bodies and environmental organisations and so on. Without time for these activities, community life loses that wholesomeness which is the birthright of our future generations.\(^41\)

Note that some of what he catalogues—participation in political, community, and advocacy groups—has obvious social significance. However, even when sodalities lack an overt political purpose, e.g., recreational and sporting clubs, participation in them builds up social capital in a way that has a broader ripple effect; that effect contributes to more vital communities.\(^42\)

These effects are less obvious when leisure time is taken for meditation, spiritual reflection, or merely loafing; when spent in pursuits such as coin collecting, reading tarot, or consuming lawful products. But societal benefits there are in such activities, not necessarily in being composed of persons who lead more fulfilled lives,\(^43\) though such may well be the case, but simply in being composed of persons who are and who understand themselves to be free: "[F]reedom implies an ability to function within the standards established by human needs, and this in turn implies a

\(^{41}\) Ron McCallum, Employer Controls Over Private Life 6–7 (2000).


\(^{43}\) Some leisure activities—compulsive consumption stands out—as with other addictions, may be self-defeating as a source of deep fulfillment. But that would be for the person to decide. Thus, a lawful activity law would prohibit an employer from regulating its employees' lawful addictive behavior absent demonstrable workplace consequences. Interestingly, one addictive behavior that has negative personal and social consequences and that employers can regulate because of its work-relatedness is workaholism. See Daniel Hamermesh & Joel Slemrod, The Economics of Workaholism: We Should Not Have Worked On This Paper, NBER Working Paper No. 11566 (August, 2005). But, except for employees subject to the Fair Labor Standard Act's requirement of overtime pay, it does not appear that American employers are inclined to limit that activity.
capacity to choose alternatives." To the extent one is denied that capacity, he or she becomes either dehumanized or infantilized.

3. The Separation of "Work" and "Off-Work" Zones

The authors treat this end as posing an insuperable obstacle for legislative distinction; indeed, they suggest that the conflation of the two, increasingly worked by modern technology, may explain why so few states have enacted lawful off-duty activity laws:

PDAs and laptops and high-speed data connections between work and home have blurred the on-duty/off-duty distinction for many employees. For better or worse, more and more of us find ourselves working anywhere and anytime, even as we are engaged in other lawful activities or the consumption or use of various lawful products.

The argument is a non sequitur. It does not follow that because an employer may insist on being able to reach an employee anytime, anywhere, because doing work at home has or may become commonplace, the employer may therefore dictate what soft-drink the employee may consume when at home or what games she may play when away from it.

There is more historically to be said. Prior to the rise of wage labor in the eighteenth century as the dominant form for the manufacture of goods and the provision of services, the makers of goods and the providers of services were either independent contractors or journeymen, subject in both instances to extensive legal and social controls, or persons in some form of tutelage, i.e., in master-and-servant (or apprentice) relationships. Capitalism, the factory system, arose in tandem with the value the Enlightenment placed on individual freedom: the employee’s freedom of contract was understood, in theory, to uncouple the worker from moral tutelage. As Robert Castel explains:

The development of the modern system of wage labor requires several specific conditions to come together: these include but are not limited to the possibility of encompassing the whole of the active population; a rigorous delineation of the different kinds of work and the clarification of ambiguous categories such as domestic

44. Seligman, supra note 32, at 341.
45. Howie & Shapero, supra note 21, at 35.
46. According to a 2004 Bureau of Labor Statistics study, 20.7 million workers, over 15% of those employed, worked at home one or more times a week. DLR No. 184 (Sept. 23, 2005) at D-4.
work or agricultural work; a firm distinction between work and leisure time; and a precise account of the times of work.\textsuperscript{47}

A modern organizational theorist makes much of the same point from that perspective:

[T]he psychological and sociological life of industrial culture was based on two developments and their compensations: a more varied economic life balanced by a simplified system of evaluation and a freer individual life balanced by the more internalized voice of authority.\textsuperscript{48}

In the United States, however, “the law imported into the employment contract a set of implied terms reserving full authority of direction and control to the employer” that had been developed by the courts in the master-servant relationship.

The natural and inevitable authority of the master could then be invoked, for that authority had already been established as the defining characteristic of the master-servant relation. In this way, the continuing master-servant imagery lent a legal foundation to managerial prerogative.\textsuperscript{49}

It is important to stress, therefore, that there was, and is, nothing “inherently natural” or “inevitable” in that authority. Under the master-servant regime it was for the courts to decide what powers a master had: public law defined the scope of managerial prerogative.\textsuperscript{50} There is no reason to consider that question settled as a matter of public law two centuries on.

In the Gilded Age, American employers did impose regimes of moral tutelage on their employees by the adoption of rules regulating off-duty behavior: because of a perceived connectedness to work—dancing, drinking, going out late at night, and even participating in religious revivals were forbidden as conducing toward fatigue on the job the morning after—because of the


\textsuperscript{49} Selznick, \textit{supra} note 1, at 136.

\textsuperscript{50} Id.

\textsuperscript{51} Much of the same process occurred in Great Britain save that the question of managerial prerogative was decided by the courts under the criminal law. Simon Deakin & Frank Wilkinson, The Law of the Labor Market: Industrialization, Employment, and Legal Evolution 14 (2005).
employers' moral code, or both. But these were resented and, where possible, resisted by the employees made subject to them; the scope of managerial prerogative was then, as it is now, contested terrain.

The encroachment of work on private time today is of growing concern; it may call for economic, social, and so legal reconstruction. But it scarcely argues for employer power over private life. A better case can be made for the proposition that the centuries-long human demand for "a freer individual life" promised by capitalism's eclipse of tutelage is brought to fruition in contemporary lawful activity legislation.

B. The Unsuitability of Judicial Intervention

The bulk of the laws assuring employees a right to engage in lawful activity or to consume lawful products acknowledge that countervailing considerations may allow for constraints on its exercise. Antidiscrimination in employment law similarly provides for legitimate business necessity (or bona fide occupational qualification) as a defense and the courts have recognized much the same doctrine even as applied to statutory privacy protections. The nature of an employer, e.g., a church, or of the particular employment, e.g., as corporate spokesperson,

52. The historical accounts are reviewed in Matthew Finkin, Employee Privacy, American Values, and the Law, 72 Chi.-Kent L. Rev. 221, 246–47, 249–51 (1996). Note, for example, the following rules issued by Carson, Pirie, Scott, & Co., a department store, to its clerks in 1927:
5. The clerk who is in the habit of smoking Spanish Cigars—being shaved at the barbers—going to dancing parties and other places of amusement and being out late at night—will assuredly give his employer reason to be ever suspicious of his integrity and honesty.

7. Each clerk must pay not less than $5.00 per year to the Church and must attend Sunday School regularly.
8. Men clerks are given one evening a week off for courting and two if they go to prayer meeting.
9. After the 14 hours in the store the leisure hours should be spent mostly in reading.

Delbert Miller & William Form, Industrial Sociology 561 (1951).


may be so intertwined with aspects of off-duty conduct as to justify an employer’s constraint on it. Our authors argue, however, that as to these lawful activity and lawful product laws, the employer’s judgment is the only one that counts; that the courts cannot be trusted to weigh a business’s interests against the statutory protection. They do not critique the decisional law arising under these other exemptions to bolster their case. From what appears, they trust the courts to decide when business necessity supersedes a claim of wrongful discrimination, but not when the claim is to the observance of private life. They do not explain why the courts are less to be trusted in the latter instance than in the former. Instead they give a series of hypothetical cases, a parade of horribles, where the employer should be free to regulate, but in which, they fear, the courts might reach an opposite result.

The tacit assumption of the argument is that if there is a balance to be struck, it should be for the employer to strike. I.e., that the employer is not only better suited than a court to know what is in its interest, but it is better suited to strike the balance of its employees interests as well. That argument is dealt with elsewhere. It is all of a piece with the authors’ embrace of the sanctity of the at-will rule; it exudes the Weltanschauung of the late nineteenth century. As George Baer, spokesperson for the anthracite coal industry, wrote in 1902, “The rights and interests of the laboring men will be protected and cared for . . . by the Christian men to whom God in his infinite wisdom has given control of the property interests of this country . . .”

To our authors, whenever management conceives its business interest potentially to be implicated there is simply no balance to be struck. And, as we will see below, because management would not impose a restriction unless it conceives of there being some business connection, a law requiring proof of a connection sufficient to persuade a public body cannot but work an unjustifiable intrusion into managerial prerogative.

The cases we are given conveniently break down into four situations: (1) where there is a demonstrable impact in the workplace; (2) where the employer fears an on-the-job impact in terms of the employee’s ability adequately to perform; (3) where the employer has a moral or ideological distaste for the employee’s

conduct that has otherwise no demonstrable connection to his or her ability adequately to perform, or where the employer fears that customer distaste on those grounds will cause it to lose business; and (4) where the conduct manifests what management conceives to be disloyalty to it.

Because there is as yet almost no texture of decisional law under our lawful product and lawful activity laws, the following will look to guidance from the law in France and Germany where the courts have considered claims analogous to those our authors make.58 It is interesting in that regard that employers in these countries would seek to impose many of the controls on private life that our authors defend despite the difference in the legal environment: apparently the impetus for managerial control transcends national boundaries. Thus, such comparative resort is altogether fitting and proper: these are industrial (or post-industrial) democracies; we share a general commitment to economic liberalism; we share a common legal heritage, especially in our professed respect for individual freedom; our open-mindedness to their legal thought is a matter of record,59 and, in a globalized product and labor market, it makes sense to see how a different approach to a common legal problem actually plays out.

1. Concrete Impact

The authors posit two cases. In one, the employee’s activity imposes an added cost in lost work time and medical benefits. In the other, management has good reason to believe the worker’s physical presence on the job is so offensive as to cost it co-workers and customers. As will be shown straightaway, neither of these cases is problematic, one way or the other.

58. France’s highest court for such matters is the Cour de Cassation and it will be referred to as such. The German labor court system is composed of a court of first instance, the Arbeitsgericht (ArbG), an intermediate court of appeal, the Landesarbeitsgericht (LAG), and a federal and final court of appeal, the Bundesarbeitsgericht (BAG). These decisions will be referred to by the courts’ respective acronyms.

There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and, as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted.
a. The Snow Mobiling Customer Service Representative

A customer service representative whose hobby of snowmobiling causes her to be injured many days each winter, thereby creating attendance problems and requiring the employer to pay for her medical expenses under its group health plan[

Our customer service representative seems to be accident-prone (and oddly impervious to it), for in 2001, fewer than thirteen thousand of over four and a half million of those who snowmobiled (i.e., 0.0028 of them) were injured. In contrast, thirty-nine percent of non-work related disability injuries, 3,600,000 in all, were the result of automobile accidents; and another twenty-nine percent, 2,900,000 of them, were the result of accidents in the home. Curiously, our cost-conscious employer hasn’t ordered employees who’d been in auto accidents not to drive, nor does it inspect its employees’ homes to see if adequate precautions against accidents have been taken. Yet our authors depict an employer overwhelmed by the cost of one hapless employee’s recreational accidents. In fact, they point out that federal law prohibits the employer, as a self-insurer or self-funder of medical benefits, from excluding injuries from certain sporting activities from coverage, including snowmobiling. Obviously,

61. Id. at 52.
62. Henry Ford conditioned his $5 a day wage on employees being made subject to intense home inspection for wholesomeness and adherence to middle class values. Stuart Brandes, American Welfare Capitalism 1880–1940, 88–89 (1970). Our authors would seem to have no difficulty with an employer requiring its employees to submit to home inspections for accident reduction purposes.
63. As the authors point out, the Federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) is applicable to employers insofar as they are either self-insurers for their employees’ medical benefit or fund a group health plan via a third party. They note that it forbids a group health plan or insurer to exclude from coverage or to require a greater employee premium for employees based inter alia on “evidence of insurability.” “Evidence of insurability” is defined by regulation to include participation in activities such as snowboarding, horseback riding, skiing, and the like. 29 U.S.C. § 1182(a)(1)(G) (2004), as interpreted in 29 C.F.R. § 2590.702(a)(2)(ii) (2004). See H.R. Rep. No. 104-496, pt. 1, at 76, 5 U.S.C.C.A.N. 1865, 1876 (1996): The Committee notes that the inclusion of evidence of insurability in the definition of “health status” is intended to ensure, among other things, the individuals are not excluded from health care coverage due to their participation in activities such as motorcycling, snowmobiling, all-terrain vehicle riding, horseback riding, skiing and other similar activities.
Congress sought to protect the right of employees covered by these health plans to engage in those activities. If these recreational activities result in greater medical costs, federal law expects business to bear it; but our authors fail to see this provision as stating a public policy that in any way colors the employer’s obligations. To the contrary, because these costs cannot be avoided, the authors would have the employer forbid the activity potentially giving rise to them.

In the event, the answer to this question is straightforward: Under a lawful activity law an employer may not forbid an employee to engage in recreational sport out of concern that the activity might or does result in some cost to the employer. What else would such a law mean? Why else would it be needed?

b. The Odiferous Waiter

A waiter at a vegetarian restaurant smokes while off-duty and off-premises, but shows up for work with the smell of tobacco on his clothes and hair.

The answer here is equally categorical, though to an opposite effect. It is irrelevant that the employee is a waiter and that he works in a vegetarian restaurant. A saleswoman wearing a noisome perfume or sporting a tongue-post would do as well

64. Nothing in the Employee Retirement Income Security Act (ERISA), which HIPAA amends, would forbid an employer from refusing to hire an employee who snowmobiles. But Section 510 of the Act prohibits discrimination in regard to incumbent employees “for the purpose of interfering with the attainment of any right to which such [benefit plan] participant may become entitled under the plan.” 29 U.S.C. § 1140. Insofar as discharge would be grounded exclusively on the employer’s desire to reduce the medical costs attendant to such activity—activity that Congress meant to be covered—it would seem to violate the Act’s prohibition to dismiss an employee to defeat the attainment of those medical benefits.

65. Under German law an employee has a right to continued pay for a set period of disability if the disability is without the employee’s fault. This is provided for in the German Civil Code, Bürgerliches Gesetzbuch [BGB] [Civil Code] 16, and in the Act on the Continuation of Payment in the Case of Sickness and Public Holidays—the Entgeldfortzahlungsgesetz (EFZG). The labor courts have considered the right of employees to engage in off-duty activities, when injury is incurred as a result, in deciding the question of fault. They have required continued wage payment to employees injured in amateur boxing, hang-gliding, playing soccer, and even when folkdancing (Schuhplattler) on a table. 2 Däubler, supra note 20, at 490. But they have required the employee to bear that cost when he or she engages in especially dangerous sports such as bungee jumping. Günther Schaub, Arbeitsrechts-handbuch § 98 II 6(d) (8th ed. 1996).
insofar as the employer's concern is for on-the-job conduct that repels customers. Nor is consuming a lawful product the nub of the employer's concern, for an employee with close customer (or co-worker) contact who refuses to use a lawful product, i.e., a deodorant, would be equally situated. The employer interest here is with on-the-job behavior that the employer is free to control.

c. The Cost Conundrum

As a cost to the business impends in both these cases—in the former, in the form of lost work time and elevated medical benefits, in the latter, in the form of lost customers—it can be argued that there is no principled economic basis on which to distinguish them; because the employer can regulate the waiter's odiferousness it ought also be able to regulate the customer service representative's snowmobiling. The premise is correct, these cases cannot be distinguished in economic terms; but the conclusion does not follow for the distinction is societal, not economic. Employers are forbidden to make a variety of decisions that are arguably cost-effective because we deem them socially unacceptable: In the vast majority of states, truck laws going back a century forbid contracts permitting employers to withhold wages, commonly a month or six weeks of pay, as a bond to secure good performance and timely notice of quitting, even though these provisions may well reduce the costs of lost work time, recruitment, and job training. Nor may an employer refuse to hire a union organizer even though her organizational efforts, if successful, will inevitably result in demands for higher wages and benefits. The critical distinction between the snowmobiling customer service representative and the odiferous waiter is social, not economic: the latter involves behavior on the job, the former behavior away from it. If, as a matter of policy, we think it wrong for an employer to conflate the two, the role of cost must be treated less deferentially in the former situation than in the latter, and even in the latter, as we have just seen, certain cost-effective

68. Because employers may exclude smoking-related conditions from coverage under their group medical plans, shifting the risk of those costs onto employees, there would seem to be scant justification for a prohibition on hiring smokers in those states lacking a lawful product law. See Christianson v. Poly-Am., Inc., Med. Benefit Plan, 412 F.3d 935 (8th Cir. 2005).
measures may be socially, and so be legally, unacceptable. The question of what makes for a good society is not definitively answered by pointing to an employer’s balance sheet.

2. Fear of an Effect on Workplace Performance

The authors give us seven cases:

- An attorney at a law firm drinks heavily and shows up for work in the morning hung over, but otherwise able to work;
- A chief financial officer of a publicly traded company is frequently seen wagering large sums of (her own) money at local casinos and racetracks;
- A bookkeeper/accountant begins to rack up huge credit card debt because of his hobby of collecting rare stamps and coins;
- A supervisor with a gay subordinate takes an active off-work role in an anti-gay group that is lobbying for strict sodomy laws and that openly advocates that gay and lesbians should be "cured" of their "disease";
- A supervisor and a subordinate in a different department have a consensual affair that they openly flaunt to friends and colleagues off-duty;
- A sales/marketing manager at a health spa begins eating an unhealthy diet and grows heavy and out of shape; [and]
- A prominent scientist at a university develops an interest in becoming a psychic and does palm readings for students on the side[.]

Note that in none of these cases has there been any effect on job performance. Indeed, our authors claim that employers should be able to act in these cases without having to await any workplace effect. But if we wish to insulate private life from employer control, absent an effect on job performance or workplace efficiency, would we not want to require such a demonstrable effect as a condition of exemption? Let us work through the authors’ object lessons with that in mind.

The imbibing lawyer. Should it make a difference that our lawyer is bleary-eyed from drink in contradistinction to being bleary-eyed from attending religious revivals or participating in late night amateur theatricals? Nothing would prohibit the employer from expressing concern to the employee about the possibility of any of these activities affecting her workplace
performance. Absent an effect on performance, however, the employee could no more be discharged for enjoying alcohol than she could for attending revival meetings, participating in theatricals, or persistently staying up late with a chronically ill child—lawful activities all.

_The gambling CFO & the coin collecting bookkeeper._ Personal probity is surely an essential requirement in both jobs, but is gambling or incurring debts a litmus test of one's probity? If gambling (where lawful) were morally disqualifying, neither the Author of the Declaration of Independence, nor the author of the _Book of Virtues_ would be eligible for a position of trust. If running up a huge debt disqualifies our bookkeeper, apparently for fear of defalcation, should it not be irrespective of how the debt was incurred? Standing as surety for an improvident parent or accumulating enormous medical bills for a child's catastrophic illness would do as well, would they not, lawful activities each?

_The homophobic supervisor._ Some of the most publicly prominent and vocal opponents of the "gay rights" movement ground their criticism in the teachings of their church. One who publicly expresses these opinions as a genuine aspect of authentically-held religious belief can be discharged when that expression takes place in the workplace and so creates a harassing working condition for subordinates and co-workers. But that is not this case; there is no suggestion here of workplace expression or effect.

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69. The LAG in Munich made it plain thirty years ago that the enjoyment of alcohol having no impact on on-the-job performance could not be prohibited and, _per contra_, where the effect of drinking over the weekend (by a truck driver) rendered the employee incapable of performance on the following Monday, discharge would be permissible. Judgment of 23 Sept. 1975 LAG Munich, _reported in_ Betriebs-Berater 1976, 465.


72. Alternatively, the employer might fear the expense and threat to efficiency should the employees' wages be subject to garnishment due to these debts; and it might fear as well the bad publicity were the employee compelled to file for bankruptcy. But both federal (and most state) laws protect employees from discharge due to garnishment, 15 U.S.C. § 1674(a), and federal law does so with respect to bankruptcy as well. 11 U.S.C. § 525(b).

73. Bodett v. Coxcom, Inc., 366 F.3d 736 (9th Cir. 2004).
Should an employee not have a right to engage in political speech outside the workplace? The *Payne* dissenters thought they should and so do several state statutes that specifically protect extramural political speech or activity.

Insofar as Title VII protects non-workplace religious speech, speech which might be directed to the public political sphere out of religious conviction, why should it make a difference that the speech at issue here stems from the speaker’s non-religiously grounded conception of the good society? Given the growing ethnic and religious diversity of the workforce, it might be expected that the workplace will increasingly be inhabited by persons of sharply differing views on the most highly charged political issues of the day, those that fire the strongest passions—abortion, the Iraq War, gay marriage, gun control, the Middle East. Should employers be allowed to tell employees, however quiescent they may be at work, that they may not be outspoken publicly on these or like issues on their own time? (In the large number of states that protect the employee’s right to vote free of employer control, the law would be accordingly that an employee may vote for a candidate running on a platform of “family values,” but may not publicly urge others to do so.) Would not the exercise of such corporate power tend to “sap the foundation of our free institutions,” just as *Payne* dissenters feared more than a century ago? Our authors are indifferent to the negative externalities of the exercise of the power they would accord. Indeed, they deny the very existence of any public interest in it. We will have occasion to revisit that issue a bit further on.

**The lovebirds.** Our employee-lovers are not in a supervisor-subordinate relationship on the job; indeed, they are in separate departments. There is no apparent conflict of interest nor any prospect of favoritism. Accordingly, the principle that should guide the judiciary under a lawful activity law was stated by Judge McLaughlin:

> It is repugnant to our most basic ideals in a free society that an employer can destroy an individual’s livelihood on the basis of whom he is courting, without first having to establish that the employee’s relationship is adversely affecting the employer’s business interests.

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Our authors have added another factor, however: that the co-workers are "flaunting" their relationship. Nothing more is said about this. We are left to speculate that this affronts their colleagues' sense of moral decorum, but co-worker moral preferences are surely entitled to no greater solicitude than the employer's.

_The obese sales manager._ This is an interesting case, but not really one of lifestyle regulation, for obesity need not be the result of eating habits. In fact, it makes no difference to the employer why its sales manager has become obese. The spa’s management believes its salesmen should be physical models for the service they sell and that an obese salesman is a bad model, however capable otherwise. Thus, the question actually presented is whether obesity ought be a category subject to legal protection: Michigan forbids discrimination on grounds of weight. The District of Columbia forbids discrimination on grounds of “personal appearance,” meaning “bodily condition or characteristics,” and its allowance of “business necessity” as a defense would seem to reject the employer’s “role model” theory. The French Labor Code forbids discrimination on the grounds of “physical appearance.” Should this principle be adopted more widely? The authors think not, and let us concede _arguendo_ that they may be right. But can it be said with positive assurance that that decision is not a matter of social policy in which the public interest may call on the legislature to decide?

_The palmist professor._ This is a curious example for the professorate has long maintained the separation of private life from professional life as a matter of principle, and that principle is generally accepted as a matter of institutional policy.

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76. Where obesity is the result of a medical condition it is treated as a matter of disability discrimination. Finkin, Privacy in Employment Law, _supra_ note 5, at 415–17.


79. _Id._ at § 2-1401.03(a) (disallowing “the preferences of co-workers, employers, customers or any other person” to constitute a defense).


throughout non-denominational American higher education. The academic profession recognizes, as an ethical principle, that a professor has a relationship of confidence with his or her students: evaluations of student work should reflect the student's true merit; the professor should avoid any exploitation, harassment, or discriminatory treatment of students. Absent evidence that the professor is grading students according to his or her palm readings or is exploiting, harassing, or discriminating against students as a result of those readings, it is beyond peradventure in the academic community that the institution would not be authorized to order him to desist; the mere opportunity for an ethical lapse cannot provide a basis for regulating private life any more than it would justify intrusive monitoring in professional life.

Has this precept broader purchase? French law thinks it has. Madame Mazurais was a medical secretary in Cannes, with access to confidential patient files. She became a reader of tarot ("voyante tarologue") and was dismissed out of concern that she might breach patient confidentiality, perhaps even to predict the patients' medical futures on the basis of her readings. The Cour de Cassation held the termination impermissible for want of evidence of an actual breach of confidentiality, i.e., for the want of any evidence that her private activity affected her job performance.

82. The literature here is substantial starting with Richard Hofstadter & Walter Metzger, The Development of Academic Freedom in the United States (1955). See American Association of University Professors, Recommended Institutional Regulations on Academic Freedom and Tenure § 5(a), in AAUP Policy Documents and Reports 21, 25 (9th Ed. 2001) ("Adequate cause for a dismissal will be related, directly and substantially, to the fitness of faculty members in their professional capacities as teachers or researchers. Dismissal will not be used to restrain faculty members in their exercise of academic freedom or other rights of American citizens."). The insulation of private life from institutional scrutiny has been extended to Church-affiliated institutions. Academic Freedom and Tenure: Lynchburg College, 64 Academe 498 (1979). An excess of professional caution counsels the author to disclose that he has served as General Counsel to the American Association of University Professors and as chairman of its Committee A on Academic Freedom and Tenure.


3. Employer or Customer Repugnance on Political or Moral Grounds

a. Political Activity

We earlier took up the case of the homophobic supervisor actively lobbying for anti-gay laws. The employer feared his political speech would create a hostile environment vis-à-vis co-workers, even though no hostility to subordinates or co-workers was manifested in the workplace. To it we now should add the two further hypotheticals our authors supply:

- A hotel manager joins the Ku Klux Klan, eventually assumes the position of Grand Dragon, and is involved in organizing a public parade (with all appropriate permits) to advocate the repeal of the civil rights laws and a return to segregation;
- A nursing home attendant accepts an off-duty role as a prominent spokesperson for a euthanasia group.

What the Grand Dragon and euthanasia advocate add is the prospect of the employer’s loss of business resulting respectively from the repugnance putative hotel guests might have with the manager’s views and with nursing patient family members’ potential fear that the advocate might turn activist on the job.

These cases vex because we accept the fact that customer preference has full sway when a service is performed by an independent contractor. A doctor who publicly defends the right to abortion and a lawyer who publicly defends the civil liberties of an accused terrorist risk losing patients and clients respectively out of disapproval with their expressions or activities. But, they may well replenish their practices with patients and clients sympathetic to them. Employees are differently situated: so long as an employer believes that any segment of the public it would like to serve, no matter how small, may turn away in consequence of an employee’s outspokenness on a social or political question, it would have reason to chill her expression. The playing field here is inherently biased.

German law, which recognizes employee freedom of expression (Meinungsfreiheit), also recognizes that, on occasion, there can be very real difficulties in defining its boundaries. The truly vexing cases treat political expression in the workplace, not

away from it, though employers have been allowed to proscribe prominent public participation in certain kinds of organizations, e.g., of neo-Nazi or totalitarian persuasion. \(^{86}\) Apart from the latter, historically freighted situations, to be subject of employer control, speech must be shown to have a **concrete** impact in the workplace: as the *Landesarbeitsgericht* (LAG) in Baden-Württemberg recently put it, “In the employment relationship, the saying ‘he who pays the piper calls the tune’ is contrary to the constitutional conception of a person [*das Menschenbild des Grundgesetzes*].” \(^{87}\)

We need not decide here whether customer preference, which is not a defense to other forms of discrimination, should be a defense to political discrimination—how manifest it must be, how real and great the threat of disruption or loss must be, and the like. \(^{88}\) It is enough to show that that is a question in which the public interest is deeply implicated and which the courts would be quite properly called upon to decide.

**b. Moral Objection**

- A public relations consultant for a civic organization has a public affair with a married person, and the affair is widely reported in the media;
- A nursery school teacher takes an evening job as an exotic dancer at a local topless club named the Candi Store[.]

It does not appear that the civic organization’s *raison d’être* is the advocacy of marital fidelity; nor are our toddlers likely to be *habitués* of the Candi Store. The off duty activity in the first case is not in conflict with the employer’s mission nor, in the second case, is it likely to scandalize the clientele. On what other basis would the employer be privileged to act? The German labor courts have confronted both situations and their conclusions have been equally categorical. The LAG in Düsseldorf held almost forty years ago that an employee’s carrying on an extramarital affair is none of the employer’s business: “The defendant fails to appreciate his place as an employer. As such, he is not called upon

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86. 2 Däubler, *supra* note 20, § 5.2-5.2 at 349–50.
to judge the morals of his employees... [The employer] can exercise no influence over the private affairs of employees.\textsuperscript{89} An elementary school teacher's part-time job at a "swingers' club" was held more recently by the LAG in Hamm to fail to supply a basis for discharge:\textsuperscript{90} the club was seventy kilometers from the school and the teacher's activities there were not known to the parents or colleagues. At a minimum, absent proof of actual loss to the civic organization or disruption of the school, one is hard pressed to conclude other than in favor of individual freedom, just as these courts did.

4. Disloyalty

The lawful activity and lawful product laws' exemptions for job relatedness recognize that certain confessional or advocacy organizations can place limits where a profit-making enterprise could not. But our authors argue that these exemptions beg the basic question:

If the Coca-Cola company wants its employees to drink Coke and not Pepsi, and terminates an employee for violating this rule, shouldn't Coke be entitled to discourage the use of a competitor's (lawful) product by its own employees?\textsuperscript{91}

The answer given by a labor arbitrator almost a half century ago is—no, not as a matter of positive law, but as a matter of industrial justice.\textsuperscript{92} A service mechanic for a Ford distributor purchased a Nash Rambler (he liked the Ford Falcon but his wife

\textsuperscript{89} Judgment of Feb. 24, 1969, LAG Düsseldorf, \textit{reported in} DB 1969, at 667 ("Der Beklagte verkennt insoweit seine Stellung als Arbeitgeber. Als solcher ist er nicht zum Sittenrichter über die in seinem Betrieb tätigen Angestellten und Arbeiter berufen... Auf die privaten Angelegenheiten der Arbeitnehmer vermag er keinen Einfluß auzüuben."). The Federal Labor Court a decade ago held homosexuality an impermissible ground of action: The establishment of the area of private life remains outside the employer's sphere of influence and is limited by the duties of the employment contract only insofar as the private behavior affects the workplace and leads to its disruption. Judgment of June 6, 1994, BAG, \textit{reported in} SAE 1995, at 103, 106 ("Die Gestaltung des privaten Lebensbereiches steht außerhalb der Einflußsphäre des Arbeitgebers und wird durch arbeitsvertragliche Pflichten nur insoweit eingeschränkt, als sich das private Verhalten auf den betrieblichen Bereich auswirkt und dort zu Störungen führt...").


\textsuperscript{91} Howie & Shapero, \textit{supra} note 21, at 24.

\textsuperscript{92} Paul Swanson, 36 LA 305 (Gochnauer, Arb. 1961).
rather fancied the Rambler) and he was discharged for it: the purchase, the employer argued, implicitly disparaged its product and demonstrated disloyalty to the organization that paid his wage. In reply, the Arbitrator observed that, “An employee is not required to spend money where he earns it.”

A salesman, one who represents the product to the public, might be required publicly to manifest approval of the product he sells, but mechanics in the service department? Their “personal beliefs about the product they work on is their own affair.”

Our mechanic’s freedom of choice was protected by a collective agreement that required “just cause” to discharge; but workers elsewhere are protected by a principle of positive law. In 1989, Mme. Rossard was a secretary for a Renault distributor in Montmorillon. She replaced her Renault with a Peugeot 405, a car of like size and cost, and was fired. Her employer viewed her conduct exactly as did the Ford agency in California a generation before: her purchase created a suspicion about the quality of its merchandise, it implied public criticism of the product, it showed a lack of appreciation for the interests of her employer, and was an act of disloyalty. The Cour de Cassation would have none of it: “[I]n her private life the employee is free to buy the goods, products, or merchandise of her choice.”

IV. THE RETURN TO TUTELAGE

To our authors, managers must be able to control employees in their non-work life whenever they see any business justification so long as the activity they direct is not, strictly speaking, criminal. Contrary to the logic of free labor captured in the Payne dissent and given legal expression in these lawful activity and lawful product laws, their ideology returns us to the relationship of master and servant. Our authors would countenance the following hypothetical (but, as will be shown, not entirely fanciful) directive from the management of a multi-national soft drink company to its American workforce.

93. Id. at 308.
94. Id.
96. Id. (“dans sa vie privée, la salarié est libre d’acheter les biens, produits ou merchandise du son choix.”).
Dear valued members of our corporate family:

1. As a service to our employees, the Company has made available a debt counselor to help those in financial distress. This is good for our employees and good for the Company because we believe that employees who incur large debts are less efficient than those who are financially secure: they are more likely to be distracted at work or less committed, feeling that they're working for a financial institution and not for their own betterment. However, we believe that some employees are incurring unnecessarily high levels of debt and are not taking full advantage of our counseling service. Consequently, we have found an even better way to help you. As you know, we have arranged for your banking to be done electronically via our computer system and even have a “reasonable use” policy permitting the use of our computer system for personal business. We think it an improvement of our service to you that not only personal banking but all other business transactions, e.g., stock trades, electronic purchasing, and the like, be conducted through our system alone.[97] Pursuant to our Employee Privacy Policy, only our Human Resource Management Department will have access to these records and only for the purpose of assuring that employees who incur unusually high debts are properly counseled. A persistent carrying of large debts will be considered in determining the employee’s suitability for continued employment. A form agreeing to these terms will shortly be circulated for your signature. Failure to accept will result discharge.

2. Some employees have told us via our hotline “suggestion box” that they believe our non-fraternization policy, forbidding any employee of

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97. Cf. Rule Change by Fidelity, N.Y. Times, July 13, 1994, at D2, available at 1994 WLNR 3560883. Fidelity Investments was requiring its 13,700 employees to conduct their personal brokerage trades with the firm rather than with brokers of their choice, to “enable Fidelity to track the personal trading patterns of its employees more easily.” The rationale for this rule differs significantly from the above.
the company to date or to become romantically involved with any other employee, is unfair. They have pointed out that the potential conflicts the policy is intended to prevent from spilling over into the workplace could apply to relationships with employees of our customers and to contractors as well. We agree. Accordingly, employees of these businesses and contractors will be included in our non-fraternization policy.\[98\]

3. As you may know, a number of universities have told us they will cancel their “pour” contracts giving us exclusive rights to sell our products on campus locations, because, unfortunately, they have been badly misled into believing that one affiliate in a single South American location has not treated its employees fairly.\[99\] These contracts are very important to the Company—and to you. Our Public Relations Department has drawn up spontaneous letters from concerned alumni to institutions considering this action, to urge their Alma Maters not to do so, and threatening to withhold donations if they do. Department heads will soon have a list of the schools our employees have graduated from and will be circulating these letters for you to sign.\[100\] Time is of the essence. You must sign your spontaneous letter immediately.

4. As you may have read in the news, our recent acquisition of Stygian Springs® Sparkling Water has generated a lot of bad publicity from self-appointed so-called “public interest” groups. Our Public Relations Department has explained over and over again that the bacterial tests, conducted by an incompetent laboratory, preceded our acquisition.


100. An employer may require its employees to be “billboards” for the company’s views, absent a restriction found in positive law. Drake v. Cheyenne Newspapers, Inc., 891 P.2d 80 (Wyo. 1995). Nor do most states prohibit an employer’s control of employee donations to non-religious and non-labor organizations. Ball v. United Parcel Serv., Inc., 602 A.2d 1176 (Md. 1992).
Nevertheless, sales have been disappointing. We think it imperative that our employees manifest public support for our product.\textsuperscript{101} Whenever you purchase water, in a restaurant or a supermarket, make sure that it is Stygian Springs\textsuperscript{®}. This is as much a company obligation as showing up on time.

Such a ukase would be unlawful for our bottler to issue to its employees in France, Germany, and the many other jurisdictions, in Europe and elsewhere, that cabin the exercise of managerial control to what is understood to be an employer’s legitimate sphere. There is no evidence that companies in these jurisdictions are less productive or profitable because they are required to respect their employees’ right to a life away from work. Should the company’s American employees not have the same freedom enjoyed by their co-workers abroad? And, if not, why?

\textsuperscript{101} In \textit{Roberts v. Adkins}, 444 S.E.2d 725, 729 (W. Va. 1994), the court held public policy, found in a “company store” prohibition, to have been violated by the discharge of an employee of an oil company for purchasing a car from a competitor of another business owned by his employer. However, the court opined that it would be a different situation were the purchase to have been that of a product of a competitor of the employee’s proximate employer, not simply of a competitor of an unrelated business owned by the employer. \textit{Id.} at n.7.