

12-1-2018

Finding A Better Way Around Employment At Will: Protecting Employees' Autonomy Interests Through Tort Law

William R. Corbett

Paul M. Hebert Law Center of Louisiana State University

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>



Part of the [Labor and Employment Law Commons](#), and the [Torts Commons](#)

Recommended Citation

William R. Corbett, *Finding A Better Way Around Employment At Will: Protecting Employees' Autonomy Interests Through Tort Law*, 66 Buff. L. Rev. 1071 (2018).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol66/iss5/4>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

Buffalo Law Review

VOLUME 66

DECEMBER 2018

NUMBER 5

Finding A Better Way Around Employment At Will: Protecting Employees' Autonomy Interests Through Tort Law

WILLIAM R. CORBETT†

I. INTRODUCTION

Bonnie O'Daniel was fired, ostensibly for posting to her Facebook page a photo of a man at a Target store wearing a dress and derisively commenting on his ability to use the same restroom or dressing room as her daughters.¹ The post allegedly offended her employer's president, a member of the LGBT community, and resulted in her termination.² She sued, asserting numerous claims, including reverse sex retaliation and violation of her right of freedom of expression under the Louisiana Constitution.³ Her claims were

† Frank L. Maraist and Wex S. Malone Professor of Law, Paul M. Hebert Law Center of Louisiana State University. I am grateful to Dean Thomas C. Galligan, Jr. and the LSU Law Center for a research grant.

1. O'Daniel v. Indus. Serv. Sol., No. 17-190-RLB, 2018 WL 265585, at *1 (M.D. La. Jan. 1, 2018), *appeal filed*, 18-30136 (5th Cir. Jan. 31, 2018). O'Daniel's post read: "So meet, ROBERTa! Shopping in the women's department for a swimsuit at the BR Target. For all of you people that say you don't care what bathroom it's using, you're full of shit!! Let this try to walk in the women's bathroom while my daughters are in there!! #hellwillfreezeoverfirst." *Id.* at *8 n.1.

2. *Id.* at *1.

3. *Id.* at *1-2.

dismissed.⁴

Renee Gork was a reporter for a Fayetteville radio station that covered University of Arkansas Razorback athletics.⁵ She was fired after wearing a Florida Gators cap to the press conference of University of Arkansas head football coach, Bobby Petrino.⁶ Coach Petrino commented on the cap.⁷ Ms. Gork got a job in Gainesville, Florida with a radio station owned by the University of Florida, which was her alma mater.⁸ Ms. Gork apparently did not sue her former employer.

Janelle Perez, a police officer, was fired for having an extramarital affair with a fellow officer and sued her employer, the city of Roseville, California.⁹ A Ninth Circuit panel held that the officer was fired in violation of her constitutional rights to privacy and intimate association.¹⁰

It is debatable whether any of these three employees

4. The court explained that the plaintiff's claim under the state constitution failed because the protections are the same as those in the First Amendment of the federal Constitution, and governmental action is required. To the extent the plaintiff was asserting a claim for wrongful discharge in violation of public policy, Louisiana does not recognize the tort theory. The court explained that the retaliation for sex was actually a claim based on opposition to sexual orientation discrimination, and Title VII, under Fifth Circuit precedent, does not cover sexual orientation. *Id.* at *7.

5. See, e.g., Caroline Howard, *Renee Gork And What Not To Wear To Work*, FORBES (Aug. 17, 2010, 8:44 PM), <https://www.forbes.com/sites/carolinehoward/2010/08/17/renee-gork-and-what-not-to-wear-to-work/#4d9aaef22bf>.

6. *Id.*

7. "And that will be the last question I answer with that hat on," Petrino said. *Id.* According to the radio station, Coach Petrino and the university played no role in its decision to fire Ms. Gork. Russell Goldman, *Reporter Renee Gork Fired in Rival Team Cap Flap*, ABC NEWS (Aug. 17, 2010), <https://abcnews.go.com/Business/reporter-renee-gork-fired-rival-team-cap-flap/story?id=11422213>.

8. *Hat gets reporter fired – then hired*, CNN (Oct. 4, 2010, 3:30 PM), <http://www.wmcactionnews5.com/story/13323668/controversial-hat-costs-reporter-her-job>.

9. *Perez v. City of Roseville*, 882 F.3d 843, 848–50 (9th Cir. 2018).

10. *Id.* at 854.

should recover damages from their former employers based on their terminations. The pertinent issue here is whether they even have a viable basis for asserting claims. Ms. O'Daniel and Ms. Gork did not have viable legal claims for their terminations because they were private-sector employees. Ms. Perez did have a colorable claim because she was a government employee.

The cases are legion in which employees are terminated when employers attempt to regulate or oversee employees' conduct or expressions that the employees consider to be their own personal concerns. This area of employment law is often referred to as "privacy."¹¹ However, the better descriptive term for the diverse employee interests is "autonomy," meaning self-governance: "the right and ability to control one's own decisions and actions."¹² The *Restatement of Employment Law* proposes protecting these interests when they are outside the employment relationship and do not affect the business.¹³ It provides an illustrative list: engaging in lawful conduct outside of work; holding or expressing political, moral, ethical, religious, or other personal beliefs outside of work; and belonging to or participating in lawful associations when the membership or participation does not affect the employer.¹⁴

Private-sector employees fired by their employers for pursuit of their autonomy interests have limited legal

11. A leading treatise on the subject is entitled *Privacy in Employment Law*. MATTHEW W. FINKIN, *PRIVACY IN EMPLOYMENT LAW* ix–xx (3d ed. 2009). Perusal of the table of contents reveals the variety of topics covered: in part, medical screening and testing; drug, alcohol, and tobacco screening and testing; psychological screening and testing; monitoring employee performance and conduct; and control of employees (including various categories of association and expression). *Id.* at xxi–xxxvi. Thus, we amalgamate many diverse rights and interests within the term "privacy."

12. Matthew T. Bodie, *The Best Way Out Is Always Through: Changing the Employment At-Will Default Rule to Protect Personal Autonomy*, 2017 U. ILL. L. REV. 223, 238 (2017).

13. RESTATEMENT OF EMPLOYMENT LAW § 7.08 (AM. LAW INST. 2015).

14. *Id.*

recourse. A couple of legal principles have stunted development of the legal protection accorded to employees' autonomy interests in the United States. The first is a matter of constitutional law: the First Amendment protections (for speech, expression, association, etc.) and the Fourth Amendment protections (prohibition of unreasonable search and seizure) are restrictions on government action. Thus, private-sector employers are not restricted in the absence of government action.¹⁵ The second is a matter of state termination law: forty-nine states in the nation adhere to the "doctrine" of employment at will,¹⁶ pursuant to which employers, in the absence of a contractual or statutory restriction, may fire employees "for a good reason, a bad reason, or no reason at all."¹⁷ The result is that private sector employees can be disciplined or terminated for their conduct or expression without a remedy under circumstances in which public-sector employees might have a remedy for violation of their rights under the First or Fourth Amendments and analogous state constitutional provisions.

The American Law Institute's *Restatement of Employment Law*¹⁸ adopts a position that would create increased protection of employees' autonomy rights by a modification of the employment-at-will presumption.¹⁹ The *Restatement* advocates carving out part of employment at will and replacing it with a default rule based on an implied contract term between the employer and employee.²⁰ Under

15. Bodie, *supra* note 12, at 256.

16. Montana abrogated employment at will by enacting, in 1987, the Montana Wrongful Discharge from Employment Act. MONT. CODE ANN. §§ 39-2-901 to -914.

17. *E.g.*, *Engquist v. Oregon Dept. of Agric.*, 553 U.S. 591, 606 (2008); *Payne v. W & Atl. R.R.*, 81 Tenn. 507, 518-20 (1884); Bodie, *supra* note 12, at 224-32.

18. RESTATEMENT OF EMP'T LAW § 7.08. For a scholarly debate about the wisdom of undertaking the *Restatement of Employment Law* project, see *U.C. Hastings Symposium on the Proposed Restatement of Employment Law*, 13 EMP. RTS. & EMP. POL'Y J. 1 (2009).

19. Bodie, *supra* note 12, at 265.

20. RESTATEMENT OF EMP'T LAW, § 7.08 cmt. f. Autonomy as Default Rule

that rule, the employer could not lawfully fire the employee for conduct that does not occur in the context of the employment relationship and that does not have a significant impact on the employment relationship.²¹ Professor Matthew Bodie, a co-reporter on the *Restatement*, has written an important and provocative article in support of the *Restatement* position.²²

I agree that private sector employees' autonomy interests merit greater protection and that the employment-at-will doctrine is the salient legal tenet empowering employers to interfere with those interests.²³ I also agree that the common law offers an important and necessary vehicle for limiting employment at will and expanding protection of employees' autonomy interests.²⁴ However, I

(stating “[t]he premise of this Section is that the parties to every employment relationship implicitly agree to the level of protection stated in the Section. This implied understanding may be altered by the parties’ express agreement. To change this default rule, the parties would have to agree that off-duty lawful conduct, adherence to or expression of beliefs, or membership in lawful associations may be the subject of the employer’s adverse personnel action.”).

21. RESTATEMENT OF EMP’T LAW § 7.08.

22. *See generally* Bodie, *supra* note 12.

23. I will note, however, that modifying or limiting employment at will would leave employees susceptible to other adverse employment actions for exercising their autonomy. On the issue of whether the law should restrict employer interference by adverse employment actions other than termination, see *infra* note 96.

24. There is a patchwork of federal, state, and local statutes that protect various aspects of employee autonomy, including the Electronic Communications Privacy Act (and Stored Communications Act), a plethora of whistleblower statutes, state off-duty activities statutes, and more. *See, e.g.*, STEVEN L. WILLBORN ET. AL, *EMPLOYMENT LAW: CASES & MATERIALS*, at Part III (6th ed. 2017). A limitation of statutory protections, however, is that they often are very specific as to what activity they protect. More general and elastic protection can be achieved by common law protection. *See, e.g.*, William R. Corbett, *The Need for a Revitalized Common Law of the Workplace*, 69 *BROOKLYN L. REV.* 91, 95–96, 161–62 (2003); J. Wilson Parker, *At-Will Employment and the Common Law: A Modest Proposal to De-Marginalize Employment Law*, 81 *IOWA L. REV.* 347 (1995) (proposing that at-will be modified by common law adjustments). Furthermore, passage of significant legislative restrictions on employment at will is unlikely because of the lack of a strong lobby for it and the existence of a strong lobby against it. *See* Lawrence E. Blades, *Employment at Will vs. Individual Freedom:*

think the *Restatement* takes a less cogent and effective common law approach than it should have taken. Unlike the *Restatement* and Professor Bodie, I do not favor an implied contract term as the means to provide such protection. The better approach is by developing and expanding the tort of wrongful discharge in violation of public policy. I think the *Restatement* proposal, as explicated by Bodie, overestimates both the fit and promise of a contract approach and underestimates the fit and potential success of a tort approach. There are several reasons to believe that a tort approach would succeed where a contract approach would fail. Moreover, this is a matter of great societal importance—not just a private matter between contracting parties. Tort law intervenes to declare societal judgments,²⁵ to impose duties, and to effectuate those judgments, which the parties have not undertaken between themselves.²⁶ We need a proclamation of societal judgment and value that protection of employees' autonomy interests is important to a democratic society that recognizes the worth of employees as "full-fledged members of the community."²⁷ The tort of wrongful discharge in violation of public policy, although inadequate for the task in its current form, can be modified and fortified to fulfill this role.

On Limiting the Abusive Exercise of Employer Power, 67 COLUM. L. REV. 1404, 1434 (1967).

25. Bodie, *supra* note 12, at 261.

26. Matthew W. Finkin, *Employee Privacy, American Values, and the Law*, 72 CHI.-KENT L. REV. 221, 223 (1996).

27. Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225, 248 (2013) (quoting Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957, 968 (1989)); *see also* FINKIN, *supra* note 11, at xxxix (asserting that autonomy and privacy play important roles in the formation and maintenance of self-identity and that to cease to bear such rights is to be dehumanized); *cf.* Cynthia Estlund, *Rethinking Autocracy at Work*, 131 HARV. L. REV. 795, 795 (2018) (reviewing ELIZABETH ANDERSON, *PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT)* (2017) (questioning "[h]ow is it that a democratic society devoted to individual freedom came to tolerate the private outposts of autocratic rule and unfreedom in which most citizens spend their working lives?")).

II. PROBLEMS WITH THE *RESTATEMENT*/BODIE
CONTRACT APPROACH

Professor Bodie acknowledges the tort approach as an alternative, but he advocates the contract approach as preferable because it “better matches with the at-will rule as well as the nuanced relationship between firms and employees.”²⁸ Bodie thus urges change by working within contract doctrine despite the fact employment at will is a presumption regarding the terms of an employment contract. There are several problems with this proposal. First, employment at will, although merely a rebuttable presumption, has exerted an overwhelming influence on the law of contracts as applied in the context of employment. So profound has been that influence that the proposed implied contract term, contrary to Bodie’s contention, does not necessarily better reflect the understanding and expectations of the parties. Second, proposing a change in contract doctrine within employment law does not bode well in light of the many ways that employment at will has distorted employment contract law. Third, the proposed criteria that limit the protected autonomy interests—outside of employment and not affecting the business—are of decreasing relevance with modern technology and the restructuring of jobs. Moreover, the limiting criteria and the affirmative defense established by the *Restatement* portend that employers would not be significantly restricted and would win most litigated cases. Finally, even if courts recognized the implied term, it is not clear how the law would prevent employers from requiring employees to sign it away as a condition of employment.

Professor Bodie makes the case that the implied term better reflects the intent of employer and employee than the

28. Bodie, *supra* note 12, at 227. I rely heavily on Professor Bodie’s article for explanation of the rationale supporting the contract approach adopted by the *Restatement* and for explanation of the rationale for rejection of a tort approach. See generally *id.*

current employment-at-will doctrine; that is, most employers and employees intend that the employer cannot fire an employee for a personal activity or expression outside of work that does not affect work or the employer.²⁹ Thus, according to Bodie, establishing a rebuttable presumption forbidding termination for exercises of personal autonomy accords with the law-and-economics theory of setting default rules according to what most parties would agree to if they bargained about the issue.³⁰ It is not clear, however, that this adjustment of the at-will presumption accords with what most employers and employees intend and would bargain to. Against the backdrop of roughly a century-and-a-half of employment at will dominance,³¹ employers have become accustomed to the almost unbridled prerogative ceded to them under employment at will.³² Many employers, no doubt on advice of counsel, insert an at-will clause in a handbook, manual, or other writing and have new employees sign an acknowledgement. Employees are less certain of the law regarding termination, although they have vague notions about the possible illegality of unfair terminations.³³ Thus, the argument that the proposed implied term better accords with the intent and understanding of the parties seems dubious. There are, however, other reasons for setting default rules. Bodie argues that the modification would render employment at will as more justifiable.³⁴ While that

29. *See id.* at 241, 264–65.

30. *Id.* at 233–34.

31. Professor Andrew Morriss has chronicled the progressive adoption of employment at will by states, beginning with Maine in 1851 and Mississippi in 1858. *See generally* Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679 (1994).

32. Indeed, Professor Bodie acknowledges in the Reporter's Notes that "[b]ecause it is a departure from existing law, employers might consider it to be a 'penalty' default[.]" RESTATEMENT OF EMP'T LAW § 7.08 reporter's note to cmt. f (AM. LAW INST. 2015).

33. *See Bodie, supra* note 12, at 225–26, 226 n.10.

34. *Id.* at 226.

seems correct, it also suggests that the modification does not go far enough. Why not shift to more general just-cause termination? Furthermore, the at-will rule also can be rendered more defensible if limited by a tort theory.

Bodie argues that the contract approach is better than a tort approach because “[i]t keeps contractual performance within the contractual sphere”³⁵ While he sees this as an argument for the *Restatement* approach, I see it as an argument against it. Contract law tenets have been savagely distorted in the context of employment law because of the overwhelming strength of employment at will, and Professor Bodie acknowledges this.³⁶ There are numerous examples. Most courts require a precise form of evidence to overcome the at-will presumption and routinely dismiss evidence that would be deemed probative of most other types of contracts.³⁷ The employment contract concepts of additional consideration and mutuality of obligation, which are often invoked to defeat contracts alleged to be other than at-will, are corruptions of traditional contract doctrine foisted on employment law by the need to preserve employment at will.³⁸ The contract tenet most analogous to Bodie’s implied term is the implied covenant of good faith and fair dealing. In fact, the *Restatement* comments recognize that the proposed implied contract term is really a subset of the covenant of good faith and fair dealing.³⁹ As Bodie himself acknowledges, that concept has virtually disappeared from employment law⁴⁰ after a somewhat successful period in the 1970s and 80s.⁴¹ Simply put, contract law in the context of

35. *Id.* at 264.

36. *See id.* at 227–33.

37. *See id.* at 229.

38. *See, e.g.,* Blades, *supra* note 24, at 1419–21; Parker, *supra* note 24, at 385–89.

39. RESTATEMENT OF EMP’T LAW § 7.08 cmt. g (Am. Law Inst. 2015).

40. *See* Bodie, *supra* note 12, at 232–33.

41. *See, e.g.,* Rachel Arnov-Richman, *Modifying At-Will Employment*

employment has been shaped, distorted, and dominated by employment at will, and there is no basis for thinking that an implied contract term will significantly change that state.⁴²

The *Restatement's* implied agreement draws a line between conduct that occurs in the context of the employment relationship, which is not protected, and conduct that has no significant impact on that relationship, which is protected.⁴³ Conduct that occurs “outside of the workplace” is protected if the conduct does not “refer to or otherwise involve the employer.”⁴⁴ The workplace is defined in terms of location, hours, and responsibilities.⁴⁵ In the past, it has been common to refer to employees as having greater autonomy interests and employers as having less interest in employee activities outside the workplace.⁴⁶ Although historically this was a reliable demarcation for many jobs, the restructuring of jobs and advances in information technology have caused this distinction to become increasingly chimerical for many jobs.⁴⁷ Admittedly, the *Restatement* attempts to take account of these changes,⁴⁸ but as the workplace continues to evolve and technology advances, it would seem that defining the parameters of the workplace and scope of employment is a moving target. The *Restatement* does not protect all outside conduct, however, as

Contracts, 57 B.C.L. REV. 427, 469–74 (2016).

42. Professor Lawrence Blades, whose pathbreaking 1967 article proposed the tort of abusive discharge, considered and rejected an implied contract term as inefficacious in protecting employees. Blades, *supra* note 24, at 1421–22 (stating “it seems reasonable to bypass the law of contracts and its unyielding requirement of consideration by turning to the more elastic principles of tort law . . .”).

43. RESTATEMENT OF EMP'T LAW § 7.08; *see also* Bodie, *supra* note 12, at 264.

44. RESTATEMENT OF EMP'T LAW § 7.08 cmt. c.

45. *Id.*

46. *See, e.g.*, WILLBORN, *supra* note 24, at 277–79.

47. Professor Bodie recognizes this concern. *See* Bodie, *supra* note 12, at 266.

48. RESTATEMENT OF EMP'T LAW § 7.08 cmt. c.

it exempts conduct that refers to or otherwise involves the employer.⁴⁹ Not only does the *Restatement* limit the protected conduct as stated, but it also provides an affirmative defense⁵⁰ that employers are not liable if they can prove a “reasonable and good-faith belief that the employee’s exercise of an autonomy interest interfered with the employer’s legitimate business interests, including its orderly operations and reputation in the marketplace.”⁵¹ Thus, precisely what autonomy interests are protected and under what circumstances they are protected is a complex and nuanced issue. Can such a matter plausibly be depicted as the subject of an implied understanding? It seems that the complexity of the matter will foment disagreement over the scope of protection and considerable litigation. Moreover, the *Restatement’s* limitation on protected conduct and the employer affirmative defense suggest that, against a backdrop of employment at will, courts will afford employers considerable deference in determining that employee conduct affects the employer in some way.⁵²

Not only is the implied term beset with uncertainty, it also seems underinclusive. An employee may say or do things at work or during working hours that ought to be protected. For example, if an employer permits expression of some political views at the workplace, I think that an employee should be protected in expressing contrary views at the

49. *Id.* § 7.08 cmt. d.

50. *Id.* § 7.08 cmt. h (stating that § 7.08(c) is an affirmative defense).

51. *Id.* § 7.08(c). The point is that employers can almost always show some connection between work and what an employee does or believes. Blades, *supra* note 24, at 1406. Thus, the pivotal issue should be whether the employer’s legitimate concerns weighed against the employee’s autonomy interests justify the interference. *Id.* at 1407. As will be discussed below, this balancing of interests is better addressed by a tort theory of recovery than by an implied agreement that could not credibly be said to take this balancing into account in advance.

52. RESTATEMENT OF EMP’T LAW § 7.08 cmt. g (stating that employment at will, recognized in § 2.01, “leaves undisturbed an employer’s broad discretion” to assess deleterious effect on work or the company’s reputation).

workplace. In the end, it seems to me that an implied contract term regarding an employee's protected autonomy interests is complicated and amorphous, and it may not capture the full range of conduct that should be protected. A tort theory need not resolve all the nuances in advance.

The most significant problem with the proposed implied-contract-term approach is that it would fail to protect employees' autonomy interests for practical reasons. Setting the default in favor of employees would not prevent employers from taking it away from them by contract. Employers now routinely take rights from employees in boilerplate contract provisions. Most notable are mandatory arbitration provisions, which take the employees' right to litigate their claims in court (often accompanied by waivers of rights to pursue class or collective claims).⁵³ Also, employers use noncompete agreements to restrict employees' freedom to work for competitors when they separate from employment with the employer. There is nothing to prevent employers from taking the proposed implied term not to terminate for exercises of autonomy. So, will courts prevent the taking of the right by refusing to enforce such agreements? No. To believe that courts will not permit employers to do so without giving employees consideration is to ignore the existing examples. Will employers choose to leave the default presumption in place, not forcing employees to forfeit their autonomy rights? No. First, as Bodie recognizes, if a just cause rule were adopted "employers are in a much better position to bargain out of the default."⁵⁴ The same is true of the proposed autonomy presumption. Bodie argues that we should "see how employers adapt to the new default" before making more radical changes to employment at will.⁵⁵ We should be able to predict reliably that employers will take this right as they have taken others. It is not

53. See, e.g., *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

54. Bodie, *supra* note 12, at 263.

55. *Id.* at 265–66.

because employers are evil; rather, they make the economically reasonable and efficient decisions to avoid regulation when they can.

III. THE ADVANTAGES OF A TORT APPROACH

I favor the road not taken by the *Restatement*⁵⁶—further development of the tort of wrongful discharge in violation of public policy (WDVPP) as the common law option to provide protection of employees' autonomy interests. There are numerous reasons that the tort approach is preferable.

First, relying on the tort to protect employees' autonomy interests avoids the pitfalls of contract law in the employment context—doctrine that is dominated and warped by employment at will.⁵⁷ Doctrinally, courts do not have to accept weakening of employment at will in the realm of contract law to permit recovery under WDVPP.⁵⁸ The tort does not depend upon the understandings and intentions of

56. RESTATEMENT OF EMP'T LAW § 5.02 cmt. a (stating that the sections on wrongful discharge in violation of public policy “do[] not address whether employers engage in tortious behavior if they discharge employees for certain off-duty conduct implicating protected privacy or autonomy interests.”).

57. *See supra* text accompanying notes 35–42.

58. Admittedly, many court decisions have expressed reluctance to permit recovery under the WDVPP theory because of the tort's supposed infringement on employment at will. *See, e.g.,* Bammert v. Don's Super Valu, Inc., 2002 WI 85, ¶ 13, 254 Wis. 2d 347, 356, 646 N.W.2d 365, 369–70; Wright v. Shriners Hosp. for Crippled Children, 589 N.E.2d 1241, 1245 (Mass. 1992). However, those decisions accord the at-will principle importance beyond its contract sphere of influence. As some commentators have explained: “[A] rule of contract law has no special place in the decision to recognize a tort for the abuse of a superior economic position in derogation of public policy Judicial preoccupation with employment-at-will suggests the same sort of underlying bias reflected by the preoccupation with privity of contract prior to the development of modern product liability law.” WILLIAM J. HOLLOWAY & MICHAEL J. LEECH, *EMPLOYMENT TERMINATION: RIGHTS AND REMEDIES* 137 (2d ed. 1993); *see also* Timothy J. Coley, *Contracts, Custom, and the Common Law: Towards a Renewed Prominence for Contract Law in American Wrongful Discharge Jurisprudence*, 24 *BYU J. PUB. POLY* 193, 215 (2010) (observing that “[u]nlike the implied contract doctrine discussed immediately above and the implied covenant of good faith and fair dealing discussed below, the public policy doctrine does not stand in such direct tension with contractual employment.”).

the parties.

A related point is that the tort approach offers a better prospect for acceptance by courts because it does not require them to subscribe to an implied contract term that almost certainly does not reflect the understanding of the parties.⁵⁹ Furthermore, the tort is currently recognized by all but a few states;⁶⁰ thus, this is an argument for expansion of an existing theory rather than recognition of an entirely new theory.

A second argument in favor of the tort is that the scope of the protection is not limited by the amorphous and increasingly antiquated concept of scope of employment.⁶¹ Although the tort is beset by its own scope-of-coverage issue—defining “public policy”⁶²—that is not an issue that is of diminishing relevance in modern workplaces. Courts can adopt more expansive approaches to defining public policy.

The most important reason that the tort approach is preferable is that the tort, unlike the proposed default rule based on an implied understanding, cannot be divested by an employer’s supposed bargaining—and more likely coercion.⁶³ This is the paramount advantage because a protection that can be taken away by one party is not much protection at all.

Professor Bodie and the *Restatement* present an accurate depiction of the tort of WDVPP in a narrowly cabined form⁶⁴ as most states have adopted it. The crucial limitation is that

59. See *supra* text accompanying notes 28–34.

60. RESTATEMENT OF EMP’T LAW § 5.01 cmt. a.

61. See *supra* text accompanying notes 43–52.

62. See *infra* text accompanying notes 64–72.

63. Tort law imposes duties on parties in the interest of society regardless of the obligations they agree to in contract. See, e.g., Michael H. Cohen, Comment, *Reconstructing Breach of the Implied Covenant of Good Faith and Fair Dealing as a Tort*, 73 CALIF. L. REV. 1291, 1306–07 (1985) (describing the covenant of good faith and fair dealing as nonconsensual and extracontractual, and recommending recognition of breach of that covenant as a tort).

64. RESTATEMENT OF EMP’T LAW §§ 5.01–5.03.

there must be a clearly defined public policy such that the termination harms not just the fired employee but also injures the public.⁶⁵ Courts often decline to find a public policy implicated in a termination.⁶⁶ There are narrow and more expansive approaches to defining and identifying public policy,⁶⁷ but there is no coherent view of what public policy means in this context and no reasoned elaboration of the basis for the public/private dichotomy.⁶⁸ As one court expressed it, “[T]he Achilles heel of [WDVPP] lies in the definition of public policy.”⁶⁹ The public policy element and limitation is the principal reason that Bodie finds the tort ill-suited to protecting employees’ autonomy interests.⁷⁰ Yet, he acknowledges that the tort reminds us that employees are also “citizens within a larger community,”⁷¹ who have “social rights, duties, and responsibilities.”⁷²

While the presentation of the narrow view of WDVPP is an accurate description of the majority approach among courts, and may be appropriate for a *Restatement* project, there are different views on that matter.⁷³ As Bodie and the *Restatement* acknowledge, there also is authority for a

65. Bodie, *supra* note 12, at 250 (stating that “autonomy concerns are generally secondary to the primary concern: encouragement of actions that benefit the public”).

66. One of the most shocking cases to deny recovery is *Green v. Bryant*, 887 F. Supp. 798, 800–03 (E.D. Pa. 1995) (denying recovery to a plaintiff allegedly fired because she was beaten by her spouse).

67. See, e.g., RESTATEMENT OF EMP’T LAW § 5.03; Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1947–48 (1983) [hereinafter *Protecting Employees*].

68. See *Protecting Employees*, *supra* note 67, at 1947–49.

69. *Palmateer v. Int’l Harvester Co.*, 421 N.E.2d 876, 878 (Ill. 1981).

70. Bodie, *supra* note 12, at 259–60 (stating that “[a]t its core . . . the public-policy tort is designed to protect public interests”).

71. *Id.* at 250.

72. *Id.* (quoting *Palmateer*, 421 N.E.2d at 878–79).

73. See, e.g., Reuel Schiller, “*It is Not Wisdom, But Authority That Makes a Law: A Historical Perspective on the Problem of Creating a Restatement of Employment Law*,” 13 EMP. RTS. & EMP. POL’Y J. 39, 39–42 (2009).

broader version of the tort.⁷⁴ In contrast to the *Restatement's* description of WDVPP, the *Restatement* did not adopt an existing and static snapshot of the law regarding the contractual approach it favors; the implied agreement is a significant modification of the existing law.⁷⁵ Thus, I argue for expansion of WDVPP to protect employees' autonomy rights, drawing from both its origins and some of the more expansive development of the tort.

The tort of WDVPP traces its origin in the United States to a 1959 California Court of Appeals decision, *Petermann v. International Brotherhood of Teamsters*.⁷⁶ The tort gained academic traction and more momentum in the courts after Professor Lawrence Blades advocated for recognition of a tort of abusive discharge.⁷⁷ Blades argued that the power of corporations had come to rival that of governments and that it was anomalous that the law placed restrictions on government action against citizens but not actions of corporations and other employers that result in discharge of employees.⁷⁸ Using the torts of abuse of process and intentional interference with contractual relations by a third party as models, combined with the underlying rationale of prima facie tort, Blades crafted a tort of abusive discharge.⁷⁹

74. See RESTATEMENT OF EMP'T LAW § 5.02 cmt. h (AM. LAW INST. 2015); Bodie, *supra* note 12, at 250–51 (discussing *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 898–901 (3d Cir. 1983)).

75. See *supra* note 32, discussing Professor Bodie's statement in the Reporter's Notes to § 7.08 that the implied agreement is a change in the law.

76. 344 P.2d 25, 26–28 (Cal. Ct. App. 1959).

77. See Blades, *supra* note 24, at 1413. Professor Blades's article has been cited by 88 court decisions and 542 secondary sources as of October 27, 2018. Walter Olson declared that the article “kicked off the modern revolution in state employment law.” Walter Olson, *The Trouble With Employment Law*, 8 KAN. J.L. & PUB. POL'Y 32, 32 (1999); see also Deborah A. Ballam, *Employment-At-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653, 659 (2000) (noting that, after *Petermann*, courts in other states did not begin adopting WDVPP until after the publication of Blades's article).

78. Blades, *supra* note 24, at 1404; see also Estlund, *supra* note 27, at 795–96 (discussing “private government”).

79. Blades, *supra* note 24, at 1423–25.

The proposed tort would provide a remedy when an employer discharges an employee in order to effectuate an ulterior purpose, other than that for which the right to discharge was designed.⁸⁰ Although Blades acknowledged the argument for the more radical approach of extending all constitutional restrictions on government to private employers, he saw such an approach as too expansive and unnecessary if legislatures enacted statutes or courts developed theories to stem the tide of abusive discharges.⁸¹

The tort of WDVPP recognized today is not the broader abusive discharge tort envisioned by Professor Blades.⁸² Nonetheless, there have been many court decisions and innovations that demonstrate the capacity of the tort to protect employees' autonomy interests. While most courts⁸³ and the *Restatement*⁸⁴ limit the tort to four or five categories of fact situations, Professor Henry H. Perritt, Jr. articulated an elements-based approach,⁸⁵ which obviates the necessity of plaintiffs fitting their claims into one of the categories.⁸⁶

80. *Id.*

81. *Id.* at 1432 (“If contrary to this assumption, the legislatures or the courts proceed quickly with the task of developing other approaches, it will not be necessary to resort to the drastic yet inadequate step of limiting the exercise of private power through recourse to constitutional law.”).

82. See Kenneth A. Sprang, *Beware the Toothless Tiger: A Critique of the Model Employment Termination Act*, 43 AM. U. L. REV. 849, 868 & n.100 (1994).

83. States usually recognize one or more of four fact patterns as actionable under the tort: (1) refusal to participate in illegal activity; (2) exercise of a right; (3) performance of a duty; or (4) reporting illegal activity (whistleblowing). MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 632–47 (5th ed. 2014).

84. RESTATEMENT OF EMP'T LAW § 5.02 (Am. Law Inst. 2015).

85. Plaintiffs must prove (1) clear public policy; (2) discouraging plaintiffs conduct by termination would jeopardize the public policy; (3) the public-policy linked conduct caused the termination; and (4) the employer cannot offer an overriding justification for the termination. HENRY H. PERRITT, JR., WORKPLACE TORTS: RIGHTS AND LIABILITIES § 3.7 (1991). Courts in Iowa, Ohio, Washington, and West Virginia also have adopted this approach. See, e.g., *Fitzgerald v. Salsbury Chem., Inc.*, 613 N.W.2d 275, 281 (Iowa 2000); *Collins v. Rizkana*, 652 N.E.2d 653, 657–58 (Ohio 1995); *Gardner v. Loomis*, 913 P.2d 377, 382 (Wash. 1996); *Swears v. R.M. Roach & Sons*, 696 S.E.2d 1, 6 (W. Va. 2010).

86. There are other useful proposals to expand the tort. See, e.g., Parker,

One particular court decision demonstrates the potential of the tort theory to provide redress to employees who are fired for asserting their autonomy rights. The Third Circuit relied on Pennsylvania's tort of WDVPP to reinstate a plaintiff's claim that he was fired for not complying with his employer's requirement that he advocate for passage of a law by obtaining signatures on a petition addressed to the state legislature in *Novosel v. Nationwide Insurance Co.*⁸⁷ The fired employee sued for wrongful discharge in violation of public policy.⁸⁸ The court located the public policy of free expression in the First Amendment of the U.S. Constitution and the analogous provision in the Pennsylvania Constitution.⁸⁹ On denial of rehearing, one judge dissented, noting that the majority "ignore[d] the state action requirement of first amendment jurisprudence."⁹⁰ Following that reasoning, other courts have refused to find the public policy for the tort in the First Amendment.⁹¹ Even the Third Circuit, which decided *Novosel*, seems to have retreated from that position.⁹²

Novosel is important because it implicates one of the "rights and privileges which [is] considered so important to a free society that [it is] constitutionally protected from

supra note 24, at 402–04 (proposing that courts permit recovery for abusive discharge when the reason, if included in a contract, would result in the contract not being enforced).

87. 721 F.2d 894, 896 (3d Cir. 1983).

88. *Id.* at 896.

89. *Id.* at 899.

90. *Id.* at 904 (Becker, J., dissenting from denial of rehearing); *see also* ROTHSTEIN ET AL., *supra* note 83, at 628 ("The United States Constitution is a problematic source of public policy to support a claim of wrongful discharge, because most federal constitutional provisions protect only against abuses of government power.").

91. *See* Bodie, *supra* note 12, at 251–52; *see also* ROTHSTEIN ET AL., *supra* note 83, at 628–29.

92. Bodie, *supra* note 12, at 251 (citing *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 619–20 (3d Cir. 1992)).

government encroachment.”⁹³ The expansive approach taken by the Third Circuit thus harkens back to Blades’s urging that tort theory should protect employees against abusive discharges by employers as constitutional restrictions protect citizens against abusive intrusions by government. Although Professor Bodie sees little prospect for extension of *Novosel*,⁹⁴ I see it as broadening the tort theory along the lines described by Professor Blades. This is appropriate because protecting the autonomy rights of employees, who are people and citizens, is important not just to the individuals, but to society as a whole.⁹⁵

The tort of WDVPP, as recognized in most states today, does not provide adequate protection of employees’ autonomy. There are, however, developments that demonstrate its capacity to fulfill this role.⁹⁶ Professor Bodie argues that the balancing of employer and employee interests necessarily implicated by employee autonomy should be left in the hands of the parties via the implied agreement rather than entrusted to courts under the tort.⁹⁷ The record of contract law in employment and the penchant of employers to take rights of employees protected by only

93. Blades, *supra* note 24, at 1407.

94. Bodie, *supra* note 12, at 251–52.

95. For example, Professor Samuel Bagenstos posits that protections of privacy and autonomy are not protections of individuals’ interests alone, but also promote social equality as they protect a person’s status as a full-fledged member of the community. Bagenstos, *supra* note 27, at 248; *see also* FINKIN, *supra* note 11, at xxxix (asserting that autonomy and privacy play important roles in the formation and maintenance of self-identity and that to cease to bear such rights is to be dehumanized).

96. Employers can, of course, take adverse actions against employees short of termination. The *Restatement* takes the position that constructive discharge is covered by the tort, but it does not take a position on extending the tort to other wrongful discipline. RESTATEMENT OF EMP’T LAW § 5.01 cmt. c (Am. Law Inst. 2015). I do not advocate such expansion because courts are reluctant to oversee employers’ personnel decisions even on the matter of termination. To subject all disciplinary actions to court review is to make courts super personnel boards and to impinge too much on employer operational prerogative. *Cf.* Blades, *supra* note 24, at 1406.

97. Bodie, *supra* note 12, at 261.

default rules demonstrates why the protection must be entrusted to courts applying tort theory.

IV. CONCLUSION

I commend the *Restatement of Employment Law* and Professor Bodie for seeking to move the law in the direction of providing greater protection of employees' autonomy rights. It is important for not just the individuals but also for our society. I also agree that developing a more robust common law is the appropriate road. I disagree regarding the better common law approach to achieve the objective. Contract law is the domain of employment at will. The tort of wrongful discharge in violation of public policy offers a better way around employment at will.