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INVESTING IN WORK: *WILKES* AS AN EMPLOYMENT LAW CASE

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INTRODUCTION

The plaintiff's situation in *Wilkes v. Springside Nursing Home, Inc.*[1] warrants a fresh look in light of recent scholarship that focuses on default rules, in particular the presumption that an employment contract for an indefinite term creates a relationship of employment at-will.[2] This focus furnishes a new vantage point from which to assess the court's holding in *Wilkes*, both in isolation and in contrast with subsequent cases. The *Wilkes* court required a controlling shareholder (whether a single shareholder or an alliance among several) to demonstrate that a legitimate business purpose justified terminating the employment of a shareholder in a closely-held corporation in which economic return on equity came only through salary payments, subject to a showing by the discharged employee-shareholder that through means less injurious to him the corporation could have achieved the same business objective.[3] If the controlling shareholder cannot show a legitimate business purpose for its action—or, having established such a purpose the shareholder-employee shows the availability of an alternative less injurious than termination—the termination breaches the controlling shareholder or shareholders' fiduciary duty to the discharged shareholder-employee.[4] Otherwise, or more generally, an employment of indefinite duration (like the plaintiff's in *Wilkes)* is subject to a

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1. Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 657-61 (Mass. 1976).

2. On default rules generally, see Brett McDonnell, *Sticky Defaults and Altering Rules in Corporate Law*, 60 SMU L. Rev. 383, 393-97 (2007) (summarizing literature). For discussion of scholarship analyzing the employment at-will doctrine as a default rule, see *infra* text accompanying notes 65-78. R

3. *Wilkes*, 353 N.E.2d at 663-64.

4. *Id.* at 663.

presumption that the relationship is one at-will; either party may terminate at any time for any reason or for no reason.[5]

The presumption of employment at-will fits neatly into the category of legal rules that are defaults, that is, rules the parties may change by agreeing to an alternate term. Intriguingly, employment at-will may also fit into the sub-category of default rules that are "sticky" because either the law makes changing away from the default relatively difficult or, separate from hurdles formally imposed by the law, parties' agreements in fact rarely shift away from the default when doing so would have been optimal for the parties. Why the latter might be so—a default rule remains unchanged for reasons unrelated to legally-imposed obstacles to deter change—has attracted diverse explanations at the level of theory. These include the direct costs of drafting to oust an otherwise-applicable default rule; cognitive biases, which may stem from misunderstanding the substance of the default rule; and the deterrent effects of anticipating other parties' reactions to proposing an alternative to the default.[6]

One might characterize *Wilkes* and subsequent cases in Massachusetts and other jurisdictions as ousting the default rule of employment at-will and replacing it with a different default rule that, at least in Massachusetts, contains an irreducible core of mandatory law. This substitution makes sense to the extent employment at-will in *Wilkes* and comparable settings represents a sticky default, not an optimal rule chosen by the parties as a considered regime to govern their relationship over time as founding investor-shareholders. Data on the extent to which parties to employment agreements do or do not replace the at-will default with an alternate term bear on this question. As it happens, although most non-union employment contracts in the United States appear either not to depart from the at-will default or to adopt it explicitly, in one employment setting—CEOs of the largest public corporations—the default is almost invariably replaced by provisions imposing adverse financial consequences on a party who terminates employment without having good cause to do so.[7]

5. *See* RESTATEMENT (THIRD) OF EMP'T LAW § 2.01 (Tentative Draft No. 2, 2009).

6. See text *infra* accompanying notes 99-120. **R**

7. *See* Stewart J. Schwab & Randall S. Thomas, *An Empirical Analysis of CEO Employment Contracts: What Do Top Executives Bargain For?*, 63 WASH. & LEE L. REV. 231, 246-48 (2006).

This Article begins by introducing the doctrine of employment at-will and its contemporary operation, and applying the doctrine to the facts in *Wilkes*. The point of the exercise is making clear the impact of *Wilkes* from the standpoint of employment law. The Article next turns to scholarship examining the at-will rule as a default rule and the circumstances under which a default rule may become sticky. Against this background, the Article concludes by reexamining the holding in *Wilkes* along with subsequent developments in Massachusetts and other jurisdictions. These include the implications of buy-sell and comparable provisions in shareholder agreements. In the situations to which the *Wilkes* doctrine applies in Massachusetts and elsewhere, at-will is more likely to be a sticky default than in many other employment relationships. Several factors contribute to this conclusion, perhaps most strongly the imponderable (or un-pondered) question of how effective control over the corporation's decision-making may shift in the future.

I. EMPLOYMENT AT-WILL

A. *Terminating an Employee for "Bad Reasons"*

In forty-nine states and the District of Columbia, in the absence of an agreement otherwise, employment is an at-will relationship that either party may terminate at any time with or without cause.[8] Over the past seventy years, exceptions have softened the severity with which the at-will rule operates. In the assessment of a leading scholar of employment law, these exceptions "virtually decimate[ ]" an employer's right to fire for "bad reasons," with the consequence that the baseline default rule "now co-exists with numerous important exceptions—statutory and common law, state and federal—that prohibit the discharge of employees for particular bad reasons."[9] The so-called "bad reasons" exceptions generally support interests that extend beyond any particular employee to further public interests more generally. Thus, an employer acts

8. RESTATEMENT (THIRD) OF EMP'T LAW § 2.01. The exception is Montana, in which the Wrongful Discharge of Employment Act requires that an employer show "good cause" to terminate any employee who has completed a probationary period. MONT. CODE ANN. §§ 39-2-901 to -914 (2009). No state to date has adopted the Model Employment Termination Act, approved in 1991 by the National Conference of Commissioners on Uniform State Laws. RESTATEMENT (THIRD) OF EMP'T LAW § 2.01 cmt. a; *Model Employment Termination Act: Adoption Status Map*, NAT'L CONF. OF COMMISSIONERS ON UNIFORM STATE LAWS, http://www.nccusl.org/Act.aspx?title=Model%20Employment%20Termination%20Act (last visited Feb. 1, 2011).

9. Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1655 (1996).

with a "bad reason" when it discharges an employee on the basis of a status such as race, sex, or religion; or retaliates against an employee who refused to commit a crime, exercised a clear legal right such as filing a worker's compensation claim for job-related injuries, or performed a legal duty such as serving on a jury.[10] How broadly or narrowly the common law exceptions are formulated varies across jurisdictions, but their gist seems well-established in most.[11]

Were these exceptions to the employment at-will rule the sole source of law to which Wilkes and his counsel might have looked for relief, he would not have had a claim against his former employer, the closely-held corporation Springside Nursing Home, Inc. Based on the court's recitation of the events that preceded Wilkes's termination as a salaried officer, at worst the termination stemmed from a fellow shareholder's quest for revenge.[12] Wilkes objected to the price at which another shareholder, Quinn, proposed to buy property from the corporation and persuaded the other two shareholders to demand a higher price than Quinn "apparently anticipated paying or desired to pay."[13] Thereafter the Quinn-Wilkes relationship deteriorated to one of "bad blood" that also "affected the attitudes of" the other two shareholders toward Wilkes.[14] Wilkes notified the others of his intention to sell his shares at a price based on their appraised value—apparently shareholders in Springside had not agreed on any mechanism for the remaining shareholders or the corporation to buy out the shares of a shareholder who wished to exit—and, at the next directors' meeting, Wilkes was left off the list of recipients of salaries but Quinn received a raise.[15] Up to that time, all four shareholders received salaries in equal amounts, which increased over time as the business

10. *Id.* at 1659, 1661.

11. *See* RESTATEMENT (THIRD) OF EMP'T LAW § 4.01 cmt. a (noting that "[a] consensus has emerged in recent decades that recognizes a cause of action in tort for wrongful discharge in violation of public policy").

12. The other shareholders also chose not to re-elect Wilkes as a director. *See* Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 661 (Mass. 1976). A person is not an employee of a corporation solely because the person serves as a director. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. f(2) (2006) (stating that directors hold original undelegated powers that stem from their election to office, not delegation from shareholders; "[a] director may, of course, also be an employee or an officer (who may or may not be an employee) of the corporation, giving the director an additional and separate conventional position or role as an agent").

13. *Wilkes*, 353 N.E.2d at 660.

14. *Id*.

15. *Id.* at 660-61.

became profitable.[16] Each shareholder had an assigned area of functional responsibility (maintenance of the nursing home's building and grounds for Wilkes).[17] Two months later, at a shareholder's meeting, Wilkes was not re-elected as a director or officer, and "[h]e was further informed that neither his services nor his presence at the nursing home was wanted by his associates."[18]

Thus, Wilkes's employer, the corporation, likely terminated his employment in a culmination of ill-will toward him that originated from his dispute with one fellow shareholder, grew when he announced his wish to sell his shares, and then became more generalized. These circumstances are far from the factual underpinnings of "bad reasons" exceptions to employment at-will. For starters, in a four-owner corporation in which all shareholders also work as employees, animosity toward one shareholder-employee may so destabilize business operations and decision-making that it could constitute a good (or at least neutral) reason for termination. Additionally, his fellow shareholders' animosity toward Wilkes was uncomplicated by any public interest comparable to those justifying the "bad reasons" exceptions to an employer's right to fire an employee at-will.[19]

B. *Overcoming the Presumption of Employment at-Will*

As a default rule, employment at-will is inapplicable if employee and employer agree otherwise, for example by providing that the employment will be for a definite term or, if for an indefinite term, that only with cause may the employment be terminated.[20] The shareholders in *Wilkes* had no explicit employment agreements with Springside.[21] Although the court's opinion stresses a "long-standing policy" that employment by the corporation (and a directorship) "would go hand in hand with stock ownership"[22] and notes that "[a] guaranty of employment"[23] is a fundamental reason for investing in a closely-held corporation, the

16. *Id.* at 660.
17. *Id.* at 660 n.8.
18. *Id*. at 661.
19. *Accord* King v. Driscoll, 638 N.E.2d 488, 493 (Mass. 1994) (holding that termination of employment because shareholder participated in derivative suit was not wrongful because underlying dispute concerned only corporation, not broader public interests).
20. RESTATEMENT (THIRD) OF EMP'T LAW § 2.02 (Tentative Draft No. 2, 2009).
21. *Wilkes*, 353 N.E.2d at 661.
22. *Id.* at 664.
23. *Id.* at 662.

Wilkes shareholders did not formalize or explicitly articulate either the policy or a guaranty of employment. A softer norm or practice of continued employment is not an agreement that suffices to overcome the presumption of at-will employment. Indeed, the gap between norms that operate informally within an organization and a legally-enforceable agreement that ousts the operation of the at-will rule is well known to judges, legal scholars, and practitioners.[24]

Distinct from a bilateral agreement departing from the rule of at-will employment, in many jurisdictions the at-will presumption may be overcome by an employer's promise to limit termination, thus inducing detrimental reliance by an employee.[25] In Massachusetts, such a promise must embody a "[p]articularly explicit expression[ ] of intent" on the part of the employer to bind it to an employment "contract of extraordinary duration," that is, any duration other than one at-will.[26] It is not evident whether the "longstanding policy" to which the *Wilkes* court referred[27] had the requisite specificity because the opinion does not detail either the policy's terms or how it was documented or otherwise expressed.

Likewise, in many jurisdictions (including Massachusetts) a policy statement unilaterally made by an employer—typically in a manual or other document distributed to employees—may also create an enforceable variation away from the rule of at-will employ-

24. On the difference between informal norms in internal labor markets and legally effective agreements, see Edward B. Rock & Michael L. Wachter, *The Enforceability of Norms and the Employment Relationship*, 144 U. PA. L. REV. 1913, 1917 (1996) (observing that "[i]n non-union workplaces, a clear norm exists that an employer will not discharge an employee without cause"). Rock and Wachter argue that courts generally should not enforce such norms because formal legal enforcement would not usefully add to self-enforcement. *Id.* at 1917-20. This argument has been criticized because it ignores the possibility "that the absence of formal agreements may reflect serious contracting problems, rather than a state of efficient contracting." Walter Kamiat, *Labor and Lemons: Efficient Norms in the Internal Labor Market and the Possible Failures of Individual Contracting*, 144 U. PA. L. REV. 1953, 1954 (1996).

25. *See* RESTATEMENT (THIRD) OF EMP'T LAW § 2.02(b). In some states, promissory estoppel is not an available basis upon which to counter the presumption of employment at-will. *See* City of Midland v. O'Bryant, 18 S.W.3d 209, 215 (Tex. 2000). In some states, the statute of frauds may also preclude the use of promissory estoppel when the employer's promise was not memorialized in writing. *See* McInerney v. Charter Golf, Inc., 680 N.E.2d 1347, 1352 (Ill. 1997).

26. *See* Sioufi v. Youville Rehabilitation & Chronic Disease Hosp., No. CA9204003, 1994 WL 879990, at *2 (Mass. Super. Ct. June 27, 1994) (holding that a letter from an employer containing job offer with no expressly stated duration for employment was insufficiently definite expression of intent).

27. *Wilkes*, 353 N.E.2d at 664.

ment.[28] Some courts treat such unilateral employer statements as instances of unilateral contracts;[29] others apply general estoppel principles.[30] In *Wilkes*, Springside may not have formalized or documented its employment policies—for non-shareholder employees as well as its shareholder-employees—as would an employer with a larger work force and the corresponding need "to deal[ ] with a large number of similarly situated employees" and "communicate the terms of the employment relationship" throughout its workforce or specific segments of it.[31]

C. *Economic Good Faith*[32]

If an employer discharges an employee to evade its obligation to pay compensation for already-completed services or to prevent vesting or accrual of employee rights and benefits, the employer breaches the contractual implied covenant of good faith and fair dealing.[33] Although some jurisdictions do not recognize this application of the covenant,[34] Massachusetts was early to adopt it in, as it happens, a case decided one year after *Wilkes.* In *Fortune v. National Cash Register Co.*, the employer discharged the plaintiff, a salesman whose contract assured him of bonuses as commissions based on the price of products he sold within his geographic sales territory.[35] The contract also made explicit that the plaintiff's employment was at-will.[36] Under the contract, 75% of the bonus amount was payable to the plaintiff if the territory was assigned to

28. *See* O'Brien v. New England Tel. & Tel. Co., 664 N.E.2d 843, 847 (Mass. 1996) (stating that personnel manual may impose obligations on employer); RESTATEMENT (THIRD) OF EMP'T LAW § 2.04.

29. *See, e.g.*, *O'Brien*, 664 N.E.2d at 848.

30. *See, e.g.*, Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 908 (Mich. 1980).

31. RESTATEMENT (THIRD) OF EMP'T LAW § 2.04 cmt. a.

32. I owe this terminology to J. Hoult Verkerke, *An Empirical Perspective on Indefinite Term Employment Contracts: The Just Cause Debate*, 1995 WIS. L. REV. 837, 844 (1995).

33. RESTATEMENT (THIRD) OF EMP'T LAW § 2.06(c).

34. *See, e.g.*, Morriss v. Coleman Co., 738 P.2d 841, 851 (Kan. 1987); Sanchez v. The New Mexican, 738 P.2d 1321, 1324 (N.M. 1987); *cf.* Sabetay v. Sterling Drug, Inc., 506 N.E.2d 919, 922 (N.Y. 1987) ("'[N]o obligation can be implied . . . which would be inconsistent with other terms of the contractual relationship in which the law accords the employer an unfettered right to terminate employment at any time.'" (quoting Murphy v. Am. Home Prods. Corp., 448 N.E.2d 86, 91 (N.Y. 1983))). For a limited application of the covenant in New York, see Wieder v. Skala, 609 N.E.2d 105, 110 (N.Y. 1992) (holding that covenant was violated when law firm discharged associate attorney for action taken in compliance with rules applicable to the legal profession).

35. Fortune v. Nat'l Cash Register Co., 364 N.E.2d 1251, 1253-54 (Mass. 1976).

36. *Id.* at 1253.

him at the time the products were delivered to the customer; 100% if the territory was assigned to the plaintiff at the times of both delivery and installation of the products; and no bonus was payable under some circumstances on products shipped after eighteen months from the date of their sale.[37] Two months after the plaintiff was credited with a $5 million sale of equipment,[38] the plaintiff received a notice terminating his employment but was told to "'stay on'" in a support position.[39] The employer eventually paid the plaintiff 75% of the bonus due, paying the remaining 25% to another employee who helped to install the equipment.[40] The court held that the employer breached the implied covenant of good faith and fair dealing through its termination of the plaintiff although the employer complied with the contract's explicit terms.[41] In the court's assessment, the employer overreached, attempting to deprive the plaintiff of a portion of a commission due him, acting analogously to a "principal [who] seeks to deprive [an] agent of all compensation [due the agent] by terminating the contractual relationship when the agent is on the brink of successfully completing [a] sale."[42]

Thus, under *Fortune*, as in cases in which an employee is discharged for a "bad reason," the employer's motivation determines whether the termination is wrongful.[43] However, when breached, the *Fortune* standard and its counterparts in other states support a

37. *Id.*

38. Under the terms of the contract, the sale entitled him to a bonus of $92,079.99. *Id.* at 1254.

39. *Id.* (quoting the termination notice).

40. *Id.*

41. *Id.* at 1255.

42. *Id.* at 1257. A prominent academic defender of the at-will rule criticized the holding in *Fortune* as "wrong in principle." Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 981 (1984). Professor Epstein characterized the contract's structure of commission payments as "represent[ing] a rough effort to match payment with performance where the labor of more than one individual was necessary to close the sale," and "not simply one where a strategically timed firing allowed the company to deprive a dismissed employee of the benefits due him on completion of performance," noting that the company itself "kept none of the commission at all." *Id.* This critique ignores Fortune's entitlement to 100% of the commission had the purchaser been within his territory at the times of both delivery and installation, regardless of whether installing the equipment required the assistance of others.

43. New York, which does not recognize the tort of employer discipline or discharge in violation of public policy, recognizes that a discharge may be the basis for a claim of breach of an implied-in-law obligation of good faith and fair dealing. *See* Wieder v. Skala, 609 N.E.2d 105, 108 (N.Y. 1992) (recognizing implied-in-law contract claim where law firm discharged associate attorney after associate insisted firm comply with code of professional responsibility applicable to lawyers).

claim for breach of contract, not a tort claim or a *Wilkes* claim for breach of fiduciary duty.[44] Nonetheless, *Wilkes* and *Fortune* are doctrinally complementary. To be sure, the underlying structure of the parties' relationships in *Wilkes* did not utilize performance triggers for economic rewards or other arrangements comparable to the payment of sales commissions or bonuses. But the two plaintiffs' situations were not so dissimilar. Like the plaintiff in *Fortune*, Wilkes would receive the full benefit of his investment and involvement to date in Springside only so long as he remained a salaried employee.[45] Although, as suggested above, the reasons behind the termination of Wilkes's employment were not "bad reasons" for employment-law purposes, the court's holding requires a motive-related showing of "legitimate business purpose" to justify depriving the plaintiff of the continuing condition—employment—requisite to receiving economic returns from the corporation.[46] On the other hand, under the *Wilkes* standard, an employee-shareholder's entitlement to continued employment lacks the absolute and unconditional character of a successful contract claim under *Fortune.*

D. *Parties and Claims*

Underlying structural features also distinguish claims for breach of fiduciary duty from claims based on the employment-law doctrines described above. Employment law presupposes a relationship structured between two parties—employer and employee—who owe each other rights and duties. In *Wilkes*, in contrast, the employer's identity was in practical terms fluid over time because Springside's governance encompassed the plaintiff as a director and officer up to the rupture of his relationships with his fellow shareholders. Thus, employment law's assumed separation between employer and employee becomes clouded when the employee in question is himself part of the employer-entity's central organs of governance and decision-making. Indeed, in portions of employment law outside the scope of this Article, shareholder-directors who are not mere employees are ineligible for statutory protections applicable only to "employees."[47]

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44. RESTATEMENT (THIRD) OF EMP'T LAW § 2.06 cmt. a (Tentative Draft No. 2, 2009).

45. Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 664 (Mass. 1976).

46. *Id.* at 663.

47. Many such disputes involve professional firms. *See, e.g.*, Clackamas Gastroenterology Assocs. v. Wells, 538 U.S. 440, 449-50 (2003) (articulating test for determin-

As a consequence, claims governed by *Wilkes* differ from the employment-law claims discussed above. In *Wilkes*, although Springside was a named defendant, the judgment ran against the plaintiff's fellow shareholders (or their estates), not Springside itself.[48] That is, the court held that the other shareholders breached their fiduciary duties to Wilkes, not that Wilkes's termination breached a duty owed him by the corporation itself.[49] In contrast, typical employment-law claims focus on whether the employer itself breached its duties to an employee, while any judgment runs against the corporation.

However, other claims asserted in more typical employment-law cases are similar to those governed by *Wilkes.* Plaintiffs in wrongful-termination cases often allege separate claims against supervisors and other co-employees responsible for the termination, alleging intentional and wrongful interference with the plaintiff's contractual relations with the corporation.[50] Many courts have held that this cause of action may be based on an at-will contract.[51] If successful, the plaintiff has a claim against individual actors within the employer's organization whose conduct led to the plaintiff's discharge by their common employer, comparable to Wilkes's claim against his former fellow shareholders. To be sure, the elements that comprise the tort of wrongful interference are not identical to the components of breach of fiduciary duty. In particular, the tort of wrongful interference requires showing that the defendant acted with an improper motive or used improper means to effect the interference,[52] while breach of fiduciary duty does not require show-

ing whether individual is an "employee" for purposes of applicability of federal Americans with Disabilities Act and similar statutes administered by EEOC).

48. *Wilkes*, 353 N.E.2d at 664-65.

49. *Id.* at 663-65; *see also* Merola v. Exergen Corp., 668 N.E.2d 351, 352 n.2 (Mass. 1996) (holding that former shareholder-employee's claim of breach of fiduciary duty ran against corporation's controlling shareholder, not corporation).

50. For a Massachusetts example of a tortious interference claim against a co-employee, see O'Brien v. New Eng. Tel. & Tel. Co., 664 N.E.2d 843, 845-46 (Mass. 1996).

51. *See, e.g.*, Finley v. Giacobbe, 79 F.3d 1285, 1295 (2d Cir. 1996) (applying New York law). *But cf.* Ingle v. Glamore Motor Sales, Inc., 535 N.E.2d 1311, 1313-14 (N.Y. 1989) (cautioning that "plaintiff [must not] be allowed to evade the employment at-will rule and relationship by recasting his cause of action in the garb of a tortious interference with his employment").

52. The Restatement definition of the cause of action for tortious interference with contract is:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is

ing that the defendant either acted with a particular motive or used particular means.[53] Additionally, if an alleged tortfeasor acts within the course and scope of employment to obtain the plaintiff's discharge from employment, the tortfeasor may act as the employer itself. This bars a wrongful interference claim because a party cannot tortiously interfere with its own contract.[54] Nonetheless, the fact that claims that may arise against individual defendants in disputes governed by employment law parallels the structure of *Wilkes* claims against individual shareholders—not the corporation—for breach of fiduciary duty.

II. DEFAULT RULES, WHETHER OR NOT STICKY

A. *Efficient Solution, or Sticky Default?*

Traditional scholarly accounts of the at-will rule critiqued or defended it in theoretical terms. Critics of the rule emphasized its unfairness to employees when increasingly specialized work bound them to their employers, which left employees vulnerable to over-investing human capital in a particular job without much prospect of employment mobility.[55] To its critics, the at-will rule stems from and reinforces a basic power imbalance between employers and employees[56] and ignores the importance of workers' stakes in their jobs as tantamount to conventional forms of property.[57] Defenders

> subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

RESTATEMENT (SECOND) OF TORTS § 766 (1977). The Massachusetts standard requires that the defendant have acted with "actual malice" toward the plaintiff. King v. Driscoll, 638 N.E.2d 488, 495 (Mass. 1994) (quoting Boothby v. Texon, Inc., 608 N.E.2d 1028, 1040 (Mass. 1993)). Personal gain and personal dislike generally do not meet this standard. *Id.*

53. Under the Restatement (Second) of Torts, "[o]ne standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation." RESTATEMENT (SECOND) OF TORTS § 874. This formulation does not require showing the fiduciary's motive, just that the fiduciary's conduct (which may consist of inaction) breached its duty to the beneficiary.

54. *See*, *e.g.*, McGanty v. Staudenraus, 901 P.2d 841, 847 (Or. 1995). Courts vary in how they formulate the elements of a privilege to interfere with a fellow employee's contract. *See* RESTATEMENT (THIRD) OF AGENCY § 7.01 note e (2006) (collecting and summarizing cases).

55. *See* Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1404-05 (1967).

56. *See* PAUL WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 48-104 (1990).

57. *See* Mary Ann Glendon & Edward R. Lev, *Changes in the Bonding of the Employment Relationship: An Essay on the New Property*, 20 B.C. L. REV. 457, 474 (1979).

of the rule emphasized employee mobility via markets for labor, plus labor-market constraints on employers who might otherwise discharge employees arbitrarily or for foolish reasons.[58] Additionally, the discretion the rule confers on an employer enables it to react over the course of an employee's tenure and to terminate a heretofore hard-working employee who begins to shirk from work.[59] Moreover, by protecting an employer's exercise of discretion, the at-will rule spares the employer the prospect of after-the-fact judicial review of its decision to discharge an employee as well as the before-the-fact costs of record-keeping and other documentation that would follow a change away from the at-will rule.[60]

More theoretically, and more in tension with the predicament of a shareholder-employee like Wilkes, at-will employment contracts have been characterized as "fully bilateral, so that the employee can use the contract as a means to control the firm, just as the firm uses it to control the worker."[61] That is, just as an employer is free to threaten (and effect) termination, so is an employee. However, full bilaterality would require that the employee, once discharged, be free of remaining ties to the employer, else the employee's threat to quit would fall short of a mechanism for control over the employer. Employees who also make illiquid equity investments in their employer may, like Wilkes, have an enduring tie to the employer that the employee cannot sever through unilateral action. This weakens or vitiates any employee empowerment that might otherwise stem from the bilateral character of an at-will relationship.[62]

B. *Terms in Employment Contracts*

Three recent scholarly developments bear directly on *Wilkes*: (1) studies that examine the extent to which employers and employ-

58. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 329-330 (4th ed. 1992).

59. *See* Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8, 8-12 (1993).

60. *See* Jeffrey L. Harrison, *The 'New' Terminable-at-Will Employment Contract: An Interest and Cost Incidence Analysis*, 69 IOWA L. REV. 327, 331 (1984). Nonetheless, to the extent employment at-will is subject to any exceptions, such as the "bad reasons" exceptions discussed *supra* note 9, an employer has an incentive to document its reasons for terminating an at-will employee. R

61. *See* Epstein, *supra* note 42, at 957. R

62. A buy-sell agreement can mitigate the risk that a former employee will remain a locked-in investor in equity that pays no dividends. *See infra* notes 141-143 and accompanying text. R

ees either adopt an at-will rule in explicit terms or agree to oust the at-will default for another rule; (2) studies that explore the accuracy with which employees understand the law, in particular the law of wrongful discharge; and (3) studies that acknowledge the prospect that the at-will default may not be optimal for all parties who do not agree otherwise and suggest explanations for its "stickiness" as a default.[63] In general, empirical studies of employment contracts cast doubt on the assumption that at-will applies universally within an organization's workforce, highlight the significance of context, and suggest that the at-will rule may be a sticky default more often and for a more complex set of reasons than heretofore believed.

1. The Prevalence of Employment At-Will

Theoretical defenses of at-will employment as a default rule emphasize not just its bilateral character but its universality within an organization's non-unionized workforce; outside the precincts of tenured faculty within universities and governmental workers with civil-service protections, the same rule is assumed to apply to all within an organization.[64] Although employment at-will is widely assumed to be the dominant rule in non-union employment settings,[65] only scant empirical data confirmed this assumption until the mid-1990s.[66] Verkerke's 1995 study, using data collected through surveys of employers, found that 52% of surveyed employers contracted explicitly for at-will employment relationships, while 33% had "no documents that specify the terms governing discharge."[67] About one employer in seven, or 15%, had documents requiring "just cause" for termination.[68] Thus, although at-will by far dominated as the applicable rule, a not insignificant minority of employers (15%) could not discharge an employee without just cause.[69]

Also of interest are the formal means through which employers contracted with employees: 61% of employers contracted through an employee handbook, while only 12% addressed in employment

63. *See* text accompanying *infra* notes 99-120. **R**

64. *See, e.g.*, Epstein, *supra* note 42, at 977. Epstein's article was noted in Stewart J. Schwab & Randall S. Thomas, *An Empirical Analysis of CEO Employment Contracts: What Do Top Executives Bargain For?*, 63 WASH. & LEE L. REV. 231, 232 (2006). **R**

65. *See, e.g.*, Rock & Wachter, *supra* note 24, at 1930. **R**

66. *See* Verkerke, s*upra* note 32, at 865 (describing prior sources of empirical data). **R**

67. *Id.* at 867.

68. *Id.*

69. *Id.*

applications the circumstances under which an employee might be discharged.[70] Few (4%) employers used form contracts issued to individual employees, while only 5% stated discharge terms in offers of employment.[71]

Verkerke's study found no significant variation across U.S. jurisdictions.[72] However, contracting behavior varied systematically with employer size; small employers were twice as likely to use no documentation on point and were somewhat more likely to include "just cause" terms.[73] Large employers were most likely to explicitly contract for at-will relationships.[74]

These findings undergird Verkerke's reaffirmation of at-will as the default rule.[75] Numerically, for most employers surveyed, at-will governed employment relationships either because the default rule was not ousted or, as for 55% of the employers surveyed, because the relevant contract explicitly adopted the rule.[76] Thus, the at-will rule could be characterized as a "majoritarian" default, that is, a term replicating the outcome that most parties would choose through an explicit agreement.[77] Shifting the default rule to require a showing of just cause to discharge an employee—based perhaps on the perception that employees misunderstand their legal rights[78]—would generate no additional information through employee-employer bargaining beyond that already evident through employee handbooks.[79]

2. Whether Employees Understand Employment Law

Offsetting somewhat the normative charge to be drawn from Verkerke's data is a later study finding that employees misunder-

70. *Id.*
71. *Id.*
72. *Id.* at 868.
73. *Id.* The study used the size of a workforce to define employers' size. Small employers had fewer than fifty employees, midsize employers 50 to 249 employees, and large employers more than 250 employees. *Id.* at 868 n.132. That small employers did not use documentation may stem from the fact that they "often have no formalized personnel function." *Id.* In contrast, "midsize employers . . . more often have personnel managers, and large employers . . . almost always have specialized managers and . . . the cost of developing personnel policies can be spread over a larger number of employees." *Id.*
74. *Id.* at 868-69.
75. *Id.* at 913.
76. *Id.* at 867.
77. *Id.* at 913.
78. *Id.* at 886.
79. *Id.* at 913.

stand the at-will default rule, overwhelmingly believing that the law requires a showing of just cause to justify discharge.[80] Using survey data, Pauline Kim's 1999 study found that "misunderstanding of the at-will rule is widespread."[81] For example, 82.2% of the respondents to Kim's survey thought an employer could not lawfully discharge an employee solely to save costs.[82] Respondents' misperceptions of the lawfulness of discharge persisted once the survey instrument added a clear disclaimer that the employer "reserve[ed] the right to discharge at any time, for any reason, with or without cause."[83] To Kim, the strongest explanation for this pattern of erroneous understanding is the prevalence of extra-legal norms that forbid discharging an employee without cause.[84] Additionally, employee misperception persists over time and in the face of observed or experienced terminations, which suggests that misperception may be reinforced by employees' attachment to jobs they already have and from which they can benefit from invested effort over time only if the employment relationship is relatively secure.[85]

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80. *See* Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers' Legal Knowledge*, 1999 U. ILL. L. REV. 447, 459 (1999).

81. *Id.*

82. *Id*. at 457.

83. *Id.* Once presented with the disclaimer, 74% of Kim's respondents continued to believe that a discharge motivated purely by cost-savings would be illegal. *Id.*

84. *Id.* at 494-95; *see also* Rock & Wachter, *supra* note 24, at 1914-18 (exploring extra-legal norms that constrain discharge within organizations). Pauline Kim's study calls into question the salience to the employment context of Ellickson's canonical study of the operation extra-legal norms within rural communities. *See* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991). The communities Ellickson studied were close-knit ones that afforded ample opportunities to enforce sanctions for conduct that contravened a community norm through repeat interactions among community members. *Id.* at 56-59. In contrast, Kim characterizes employment as more like a relationship between a power plant and a coal mine, typified by explicit specification in legally-effective form of the parties mutual and obligations. Kim, *supra* note 80, at 502. This is because

> [i]f one focuses on the decision to join the firm, rather than the myriad of minute, ongoing adjustments in terms, the employment relationship appears more like a one-shot transaction than a repeat-play situation. Moreover, for the career employee, whose sunk investments render her increasingly vulnerable to employer opportunism over time, the stakes may be very high indeed.

Id. Additionally, and in contrast to the communities studied by Ellickson whose members are embedded in relationships implying ongoing interactions, "the . . . norm forbidding discharge without cause by definition comes into play at the end of the relationship," and a violation of the norm ends the relationship. *Id.* at 503 (emphasis omitted).

85. Kim, *supra* note 80, at 496. Employees may also misunderstand and underestimate the rights the law confers on them. *See* Mitu Gulati et al., *The New Old Legal Realism* 27 (Duke Law Scholarship Repository, Working Paper, 2010), *available at* http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2951&context=faculty_

Whatever the explanation, if "workers overwhelmingly misunderstand the law's protections,"[86] viewing at-will employment as a reflection of informed choice on the part of employees does not allay doubts about at-will as the default rule. At a minimum, it generates unhappy surprises and perceptions of unfair treatment for at-will employees discharged without cause.

3. The Terms of CEOs' Contracts

As it happens, the frequency with which employers and employees agree to employment on terms other than at-will is markedly higher for contracts between large corporations and their CEOs. In a study of CEO employment contracts from 1984 through 2003 (with the bulk of the sample from the late 1990s), Schwab and Thomas found that "CEOs overwhelmingly contract around the at-will default standard of termination."[87] Of the 375 CEO contracts in their sample, only twenty-five stated the contract to be at-will, while most gave the CEO greater (financial) rights against the company in the event of a termination without cause.[88] But twenty-four of the expressly at-will contracts also gave the CEO greater rights in the event of termination without cause.[89] Most contracts—86.93%—ran "for a definite term of years."[90] Definitions of "just cause" in CEO employment contracts most often listed "willful misconduct, moral turpitude, failure to perform duties, breach of fiduciary duties, and gross misconduct," and much less often sexual harassment (0.53%), incompetence (3.47%), or substance abuse (4.80%).[91] On the other hand, CEOs in Schwab and Thomas's sample typically had the right to quit without financial consequences only for "good reason" (a defined term), not simply to pursue greener pastures elsewhere.[92]

The data assembled by Schwab and Thomas suggest that, at the least, CEOs "are quite different from other employees."[93] Presumably, they argue, CEOs' contracts protect them against the rigors of at-will employment "because the value to the CEO of just-cause

scholarship (stating that a sample of casino workers interviewed believed Nevada law limited their ability to sue under federal anti-discrimination law).

86. Kim, *supra* note 80, at 506. R
87. Schwab & Thomas, *supra* note 64, at 233. R
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 234.
93. *Id.* at 241.

protection exceeds the cost to the firm" because a firing harms the CEO's reputation and other firms, post-firing, will be reluctant to hire him or her.[94] The extra compensation triggered by a non-fault termination should be calibrated to discourage a CEO from conduct that would justify discharge for cause.[95]

Additionally, Schwab and Thomas's data are consistent with the exercise of bargaining power by candidates for CEO positions (and by incumbent CEOs negotiating the terms of a new contract) and with differences in the texture or structure of processes through which a contract is formed. The formal qualities of a corporation's contract with its CEO differ from the generalized policy statements in employee manuals that typify the employee handbooks through which the employers in Verkerke's study documented their relationships with the run of the mill employees.[96] CEO contracts are the product of individualized deals in which both CEO and company are separately represented by counsel; counsel for the company usually generates the first draft of the contract, a practice explained by the fact "that these contracts become public information, which gives the company a strong interest in ensuring that it does not establish unfavorable future precedents in its negotiations with other employees or future CEOs."[97] Moreover, represented by counsel, prospective and incumbent CEOs are, unlike the respondents in Kim's survey, highly unlikely to be misinformed about the default rule applicable to at-will relationships of employment. Thus, in this context, at-will employment may not be a sticky default.

C. *Explanations for Stickiness*

Even if CEOs are *sui generis* among employees, the starkness of Schwab and Thomas's data should prompt many questions.[98] For example, are CEOs alone in wishing to preserve their reputations

94. *Id.* at 248.

95. *Id.*

96. Verkerke, *supra* note 32, at 867. No study appears to investigate the contractual terms applicable to executive officers other than CEOs. R

97. Schwab & Thomas, *supra* note 64, at 237. Only when a prospective CEO "has extraordinary negotiating power" would his or her counsel prepare the initial draft. *Id.* R

98. To characterize CEO contracts as stemming from flawed corporate governance processes does not itself answer these questions. For one thing, CEO contracts adopt an alternative to the at-will default with a near-uniformity missing in other aspects of large public companies' contracts with their CEOs, such as compensation structures and pay levels. On governance flaws and CEO compensation, see LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE 23-53 (2004).

from the damage any termination may cause? Might it be that less-well-paid employees would be even more concerned about the aftermath of discharge? Are the terms of CEOs' contracts closer to those a well-informed employee would wish and would pursue through negotiations than the at-will rule documented by most of the employers in Verkerke's study? And, as explored below, if default rules sometimes prevail because parties are deterred from negotiating around the rule—in particular, by the prospect that they will thereby signal bad information about themselves to the other parties—why are CEOs so uniformly undeterred?

Scholarship examining default rules in a range of contracting contexts identifies several possible explanations for parties' failure to oust a default rule and adopt a term that they prefer. Three general categories of explanation seem plausible in at-will employment relationships, including that in *Wilkes.* These are: (1) the direct costs of drafting an alternative term; (2) cognitive biases of all sorts, including misinformation about the substance of the default rule; and (3) the deterrent impact of anticipating the other parties' reactions if an alternate to the default rule were to be suggested. *Wilkes* itself suggests a fourth explanation, specific to founder-shareholders who are also employees, which is the inevitable risk of fluidity or indeterminacy in control over their employer.

1. Direct Costs of Drafting to Replace Default Rule

Earlier accounts of stickiness in default rules emphasized the direct cost of drafting an alternative better tailored to the parties' specific circumstances.[99] Employment may be a context in which drafting costs and their allocation remain significant. Many employees are not frequent repeat players in negotiating the terms of their employment, while employers are; and many employees lack the financial resources to retain counsel to assist them in employment negotiations. Thus, the use of counsel by present and incumbent CEOs is telling.

Additionally, the facts in *Wilkes* itself suggest that the parties made only limited investment of financial resources into legal services and customized drafting.[100] According to the court's opinion, after Wilkes acquired an option to purchase the property to be op-

99. *See* Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CALIF. L. REV. 261, 263 (1985).

100. Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 659-61 (Mass. 1976).

erated as a nursing home and enlisted three acquaintances as co-venturers, "[he] consulted his attorney, who advised him that if the four men were to operate the contemplated nursing home as planned, they would be partners and would be liable for any debts incurred by the partnership and by each other."[101] As a consequence of the attorney's advice and following consultation among the prospective shareholders, "ownership of the property was vested in Springside, a corporation organized under Massachusetts law."[102] Lawyers, legal advice, and legal drafting play no role in the remainder of the court's factual narrative up until the point of the annual meeting in which Wilkes was not re-elected as a director.[103]

2. Cognitive Biases and Errors

More recent accounts of stickiness identify a variety of cognitive biases that may impede contracting around a default term.[104] Parties may exhibit an "endowment effect" through an unwarranted attachment to existing legal rules that would lead them to prefer a default rule regardless of its content.[105] The rule's familiarity may induce inertia that the parties do not overcome.[106]

Ben-Shahar and Pottow tested the thesis of inertial attachment to default rules in the employment context with a cross-country comparison using the United States and Canada.[107] In general, the default rule in Ontario (the most populous Canadian province) is close to the opposite of the at-will default in the United States.[108] Although employers in Ontario technically have the power to dismiss employees, they must make "termination" or "notice" payments to an employee discharged without just cause.[109] But contracts between employee and employer may change these terms, subject to a mandatory minimum of employee-protective rights.[110] Ben-Shahar and Pottow asked Canadian labor lawyers how often

101. *Id.* at 659.

102. *Id.*

103. Wilkes, unable to attend the meeting, was represented by his attorney as his proxy. *Id.* at 661.

104. For a helpful summary, see Omri Ben-Shahar & John A. E. Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651, 655-56 (2006).

105. *Id.* at 655.

106. For the "inertia effect," see Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583, 1585-86 (1998).

107. Ben-Shahar & Pottow, *supra* note 104, at 678-80. **R**

108. *See id.* at 679.

109. *Id.* at 678.

110. *Id.* at 679.

employers opted out of the employee-friendly "just cause" default and learned that "the same trend of prevalent 'non-contracting' that exists under the American experience" also prevails in Canada.[111] Indeed, and consistent with some of Verkerke's findings, one of Ben-Shahar and Pottow's lawyer-respondents reported that "[i]n fact, most 'contracts' for employment consist entirely of a one-page offer letter saying, 'Congratulations, please report to your first day of work on this day at this pay.'"[112]

To Ben-Shahar and Pottow, drafting costs are not an adequate explanation for inertial attachment to the just-cause default given the simplicity with which a one-page letter could be converted into "a one-and-a-quarter page letter, with a further sentence setting by contract the termination benefits."[113] Moreover—and unless radically different explanations for attachment to a default apply in Canada—the fact that Canadian employment contracts depart from the applicable default norm no more than do counterpart contracts in the United States does not reaffirm the merits of either default.[114]

The "persistent stickiness"[115] of the just-cause default in Canadian employment contracts also calls into question the weight one might assign to Kim's findings of widespread and persistent misunderstanding on the part of employees about employment law in the United States.[116] One might be tempted to argue that such pervasive misunderstanding might explain why employees do not more aggressively seek contract terms other than the at-will default. However, the parallel persistent stickiness of the just-cause default in Canadian employment contracts is unlikely to be explained by a comparable level of misunderstanding on the part of Canadian employers and their lawyers. Moreover, if power imbalances between employees and employers explain the stickiness of at-will in employment relationships governed by U.S. law, one would expect that a comparable imbalance north of the border would lead to more Canadian contracts ousting the just-cause default. Finally, perhaps the Canadian default rule has proven sticky because it coincides with an extra-legal norm that requires just cause to termi-

111. *Id.*

112. *Id. See generally* Verkerke, *supra* note 32. **R**

113. Ben-Shahar & Pottow, *supra* note 104, at 680. **R**

114. *But see* Verkerke, *supra* note 32, at 913 (arguing prevalence of at-will choice in sample of U.S. employment contracts reaffirms position of at-will as default rule). **R**

115. Ben-Shahar & Pottow, *supra* note 104, at 680-81. **R**

116. *See supra* notes 80-85 and accompanying text. **R**

nate employment, perhaps even more sticky than the at-will default in the United States which may be at odds with extra-legal norms. If so, the Canadian just-cause default may represent the outcome many parties would reach through bargaining, as opposed to an inertial outcome that requires an explanation such as cognitive bias, drafting costs, or inhibitions that stem from anticipating other parties' reactions to seeking an alternative rule.

3. Deterrent Impact of Anticipated Signaling Effects

A default rule may also become sticky because a party who proposes an alternative to the default in contractual negotiations may signal adverse information about herself, whether or not accurately. Fear of this signaling effect may deter willingness to bargain to alter the default. Kamiat characterized the inhibitory impact of signaling as an instance of a "lemons" problem of bilateral asymmetries in information.[117] That is, both a prospective employee and an employer have unique access to information about themselves that is not readily discoverable by the other. Neither can reliably know, on the basis of the other's demand for a contract term, whether the demand is a reliable signal of (for example) a prospective employee's propensity to shirk or a prospective employer's propensity to discharge its employees arbitrarily or opportunistically.[118]

Theoretical accounts differ on the significance of signaling effects in the employment-contracting context. Verkerke argues that signaling effects are symmetrical and cancel each other out: "[j]ust as prospective employees send an adverse signal by demanding just cause, so an employer might signal, by demanding an at will relationship or refusing to agree to a just cause term, that it is unusually likely to discharge workers without cause."[119] Thus, no unequivocal implications about an optimal default rule could be drawn from the signaling phenomenon. In contrast, Ben-Shahar and Pottow argue that signals may not cancel each other out in the employment context because

> it is equally plausible that the employee's and the employer's concerns about negative inferences will compound one another in a vicious cycle, with the employee worrying about the em-

117. Kamiat, *supra* note 24, at 1958. The "lemons" problem is developed as a characterization of contracting problems in the market for used cars in George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970). R

118. Kamiat, *supra* note 24, at 1958. R

119. Verkerke, *supra* note 32, at 903. R

> ployer's propensity to discharge summarily by insisting on at will and the employer worrying about the employee's work ethic by insisting on just cause.[120]

Put differently, the signals sent by the prospective employee's and the employer's demands may reduce either's willingness to put the issue on the table at all.

Neither account explains why CEOs seem uniformly uninhibited by signaling phenomena. Employment contracts with CEOs may so transcend—and not just in amounts of compensation!—more mundane employment contracting to warrant *sui generis* treatment. Alternatively, perhaps the bargaining leverage of a prospective or successful incumbent CEO dominates negative signals otherwise associated with insistence on a just-cause standard. Additionally, to the extent that Schwab and Thomas's data establish near-uniformity with which CEO contracts opt out of the at-will default, in that context widespread practice may have created an alternative just-cause default to be included in a CEO's contract as a matter of course. An employer's decision to omit such a de facto default from its draft contract could send a strongly negative signal to a prospective or incumbent CEO, which would be amplified by the CEO's counsel when counsel furnishes expert interpretation of the signal being sent on the basis of counsel's familiarity with conventional practice.

4. Indeterminacy of Employer

At-will employment may also become a sticky default when, as in *Wilkes*, the ordinary employer-employee dichotomy is both complex and potentially murky. As Springside's founders, all four initial shareholders contemporaneously became both its employees and members of its governance structure as officers and directors of the corporation. As the facts of the case illustrate, this structure did not assure stability for any one shareholder because a 25% shareholding does not confer control over the board, nor does one seat on a four-member board. Thus, although Wilkes was initially a co-equal member of Springside's board, and thus a co-equal participant in his employer's governance, once his fellow shareholders declined to reelect him to the board, he became a non-director employee-shareholder, whose termination as an employee at the

120. Ben-Shahar & Pottow, *supra* note 104, at 678. **R**

behest of the remaining shareholder-directors followed.[121] Although formally and as an entity Springside remained Wilkes's employer throughout, in a more pragmatic sense, its orientation and allegiance shifted to exclude Wilkes.[122]

At the outset, all four shareholders—were they to consider the question—would realize that their participation as investor-employees in Springside subjected each of them to a risk of exclusion from employment and board membership. The risk materialized many years later only for Wilkes. Nothing in the court's opinion suggests that the four shareholders considered varying through contract either the at-will default or the corporate-law default of locked-in investment, discussed below. Thus, *Wilkes* exemplifies the stickiness of specific default terms with no factual basis to explain the parties' failure to contract otherwise.

Beyond general explanations for the stickiness of the at-will default discussed above, another possibility is evident on the facts of *Wilkes*. When the four shareholders formed Springside in 1951, it may not have been evident to them that the control over their employer could prove indeterminate or fluid over time. Not until 1965 did disagreement set in between Wilkes and Quinn, followed in 1967 by Wilkes's exclusion.[123] Thus, the risk of exclusion may well have seemed remote in 1951, sixteen years before it materialized for Wilkes. Much research investigates the phenomenon of over-discounting the significance of remote risks.[124] Moreover, raising in 1951 the prospect of a subsequent falling-out may well have been a negative signal of potential contentiousness that none of the four shareholders wished to send. That is, the other shareholders might have interpreted the initiative as a signal, not necessarily of a propensity to shirk from work as an employee, but as a signal of an edgy or unduly legalistic temperament. To send such a signal conflicts with manifesting commitment to a functionally harmonious relationship.

121. Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 659-61 (Mass. 1976).

122. *Id.* Thus, the court found it unnecessary to determine whether Wilkes's "claim is governed by partnership law or by the law applicable to business corporations." *Id.* at 661.

123. *Id.* at 660-61.

124. *See, e.g.*, Estlund, *supra* note 9, at 413; Bailey Kulkin, *The Asymmetrical Conditions of Legal Responsibility in the Market Place*, 44 U. MIAMI L. REV. 893, 977 (1990). R

III. Shareholder-Employee Disputes Re-examined

Much in the subsequent evolution in Massachusetts cases applying *Wilkes* can best be explained by viewing *Wilkes* as ousting the default rule of at-will employment in a specific context to replace it with a different default rule containing an irreducible core of mandatory law.[125] Other jurisdictions that adopted *Wilkes* likewise confine its operation to the same context, which is the termination of a founding or substantial shareholder's at-will employment, coupled with a lock-in of the shareholder's illiquid equity investment. In this context, and to these courts, employment at-will is a sticky default unlikely to represent an optimal choice for the parties. Jurisdictions that reject *Wilkes* may perceive the parties' failure to oust the at-will default as consistent with their choice of a rule that is optimal for them, or, more realistically, as a choice that does not warrant judicial intervention to oust the at-will default because the choice may well be optimal for some who make it. To the extent a court perceives *Wilkes* as a generalized threat to at-will as the employment-law default rule as opposed to a doctrine localized to an exceptional type of employment relationship, the court may well reject the *Wilkes* doctrine.

A. *The scope of* Wilkes

Subsequent cases sketching in the contours of *Wilkes* as applied to different facts identify founders like Wilkes as the most obvious category of shareholder-employees whose discharge triggers application of the *Wilkes* standard.[126] In contrast, an employee at-will "who happens to own stock" falls outside the scope of *Wilkes*.[127] In *Merola v. Exergen Corp.*, the Supreme Judicial Court held that "although the plaintiff invested in [the corporation's stock] with the reasonable expectation of continued employment," his employment was not formally linked to stock ownership, nor was he a founding shareholder.[128] Additionally, unlike Springside, the corporation did not distribute all its profits to shareholders through salary payments.[129] Thus, by causing the corporation to

125. The *Wilkes* doctrine is also applicable to controlling members of LLCs, a point with implications beyond the scope of this article. *See* Pointer v. Castellani, 918 N.E.2d 805, 815 (Mass. 2009) (affirming judgment in favor of LLC's former president-member; court observed that "[i]t is uncontested that [LLC] is a close corporation").

126. *See infra* text accompanying notes 128-136. **R**

127. Merola v. Exergen Corp., 668 N.E.2d 351, 355 (Mass. 1996).

128. *Id*. at 354.

129. *Id.*

terminate the plaintiff's at-will employment without a legitimate business purpose, the controlling shareholder did not breach any fiduciary duty to the plaintiff under *Wilkes*.[130] Along the same lines, in *McLaughlin v. Schenck*, the Utah Supreme Court held that, although shareholders in close corporations owe each other fiduciary duties, the duty is not breached by the termination of an at-will employee who is not a founding shareholder "who created the company with the expectation of employment," which explicitly ties employment to investment expectations.[131]

Like the plaintiff in *Merola*, the plaintiff in *McLaughlin* joined the corporation primarily in the guise of an employee, one permitted but not required to buy stock.[132] Thus, the *McLaughlin* court did not evaluate the plaintiff's discharge under the *Wilkes* standard because the discharge did not thwart the plaintiff's investment expectations.[133]

Additionally, the discharge of an at-will shareholder-employee who falls within the category covered by *Wilkes* does not always constitute a breach of fiduciary duty. The other shareholders may have no alternative less harmful to the discharged shareholder-employee. For example, in *Pulsifer v. BitFlow, Inc.*, the court held that terminating the employment of "a shareholder who neglects his duties or who disrupts company business" does not constitute a breach of fiduciary duty because "[t]here is no legal requirement to keep a disruptive or idle employee on the payroll."[134] On the other hand, when less harmful means could accomplish the overriding business objective, controlling shareholders breach their fiduciary duty when they neglect at least to explore them. Thus, in *Leslie v. Boston*

130. *Id.* at 355.

131. McLaughlin v. Schenck, 220 P.3d 146, 158 (Utah 2009). *Accord* Hollis v. Hill, 232 F.3d 460, 470-71 (5th Cir. 2000) (applying Nevada law). *Hollis* articulates a list of non-exclusive factors to aid in identifying the relevant category of shareholders:

> [W]hether the corporation typically distributes its profits in the form of salaries; whether the shareholder/employee owns a significant percentage of the firm's shares; whether the shareholder/employee is a founder of the business; whether the shares were received as compensation for services; whether the shareholder/employee expects the value of the shares to increase; whether the shareholder/employee has made a significant capital contribution; whether the shareholder/employee has demonstrated a reasonable expectation that the returns from investment will be obtained through continued employment; and whether stock ownership is a requirement of employment.

Id. at 471.

132. *McLaughlin*, 220 P.3d at 158.

133. *Id.* at 157-58.

134. Pulsifer v. BitFlow, Inc., No. 974508, 2001 WL 170453, at *19 (Mass. Super. Jan. 26, 2001).

Software Collaborative, Inc., the court agreed with the defendants' opinion that the plaintiff was not a model employee.[135] Nonetheless, as a founding (and one-third) equity investor, the plaintiff had a right to be treated with the utmost good faith by the defendants, who appear not to have considered alternatives to discharging the plaintiff, such as assigning him to other duties or encouraging him to upgrade his skills.[136]

B. Wilkes *as a Default Rule*

When applicable, *Wilkes* ousts the default rule of at-will employment. In its stead *Wilkes* imposes a just-cause standard for discharge keyed to a legitimate business purpose, against which a plaintiff may still succeed by showing the existence of means less harmful through which the purpose could be accomplished.[137] Subsequent cases make clear that the *Wilkes* standard is itself a default rule that may be replaced by terms to which shareholders explicitly agree.[138] In Massachusetts, although such an agreement does not relieve shareholders of their fiduciary duties to each other,[139] the agreement's explicit terms may narrow the scope of conduct to which fiduciary duties apply. Explicitly addressing the circumstances under which employment may be terminated replaces the *Wilkes* default. The plaintiff in *Blank v. Chelmsford Ob/Gyn, P.C.* had a written employment agreement providing for an initial one-year term of employment, "'continuing thereafter from year to year until either party shall have given written notice to the other that he (it) wishes to terminate the contract,'" the notice to be effective in six months.[140] The court acknowledged that such a provision did not "relieve stockholders of the high fiduciary duty owed to one another in all their mutual dealings" but held that discharge in compliance with the provision, entered into by the plaintiff at the outset

135. Leslie v. Bos. Software Collaborative, Inc., No. 010268BLS, 2002 WL 532605, at *8 (Mass. Super. Feb. 12, 2002). In particular, tensions arose between the plaintiff and the other two founding shareholders because he felt undercompensated. *Id.* at *2. Customers and employees complained about the plaintiff's "brusque" manner and ethnic slurs. *Id*. at *3. Three employees threatened to quit but were dissuaded when promised higher pay. *Id.* Inter-shareholder tensions escalated further, culminating in the plaintiff's threat, communicated via email, that the plaintiff's wife might shoot one or both of the other founding shareholders. *Id.* at *4.

136. *Id*. at *8.

137. Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 663 (Mass. 1976).

138. *See infra* text accompanying notes 140-143. R

139. *See* King v. Driscoll, 638 N.E.2d 488, 494 (Mass. 1994).

140. Blank v. Chelmsford Ob/Gyn, P.C., 649 N.E.2d 1102, 1104 (Mass. 1995).

of employment, gave the plaintiff all for which he had bargained.[141] Thus, *Wilkes* replaces one default rule with another, which the parties ousted by agreement in *Blank*.

Additionally, the corporation's founding shareholders in *Blank* executed a stock purchase agreement providing that the corporation would repurchase their shares at book value upon stated circumstances, including termination of employment.[142] The court held that the purchase agreement eliminated any question about how the value of the plaintiff's shares might be determined upon the termination of his employment; although "[a] duty of good faith and fair dealing exists during the course of events leading up to and including termination, [the performance of] that duty is to be evaluated in light of" an employment agreement that confers on both parties a right to terminate without cause.[143] Thus, a stock purchase agreement in itself does not oust the *Wilkes* default but, when combined with an explicit employment agreement, narrows—perhaps as a practical matter eliminates—the range of conduct to which it applies. In contrast, in *King v. Driscoll*, in which the plaintiff had no explicit employment agreement, the fact that the shareholders had agreed to stock buy-back terms did not immunize the defendant-shareholders from scrutiny under a fiduciary lens of their conduct that culminated in the plaintiff's discharge.[144]

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141. *Id.* at 1106.

142. *Id.* at 1104-05.

143. *Id.* at 1106. *Blank* is an important clarification of the court's holding in *Evangelista v. Holland*, that "[q]uestions of good faith and loyalty do not arise when all the stockholders in advance enter into an agreement for the purchase of stock of a withdrawing or deceased stockholder." Evangelista v. Holland, 537 N.E.2d 589, 592 (Mass. App. Ct. 1989). In *Evangelista*, the agreement was triggered by a stockholder's death, not termination of employment. *Id.* at 591. *Evangelista* relied on a footnote in *Donahue v. Rodd Electrotype Co.*, which stated that "[o]f course, a close corporation may purchase shares from one stockholder without offering the others an equal opportunity if all the other stockholders give advance consent . . . through acceptance of an appropriate provision." *Id.* at 593 (citing Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 598 n.24 (Mass. 1975)); *see also* Stephenson v. Drever, 947 P.2d 1301, 1305 (Cal. 1997) (holding that unless contract provides otherwise, terminated employee continues to have minority shareholder rights until compliance with valuation provisions in buy-back agreement). *Stephenson* interpreted an earlier buy-back precedent, *Coleman v. Taub*, 638 F.2d 628, 634-35 (3d Cir. 1981), to "stand[ ] for . . . the proposition that an employee-shareholder *may* bargain away his right to remain a shareholder after termination of his employment, and with it the benefits of the fiduciary duty owed by majority to minority shareholders." *Stephenson*, 947 P.2d at 1309.

144. *King*, 638 N.E.2d at 494. The court also held that the corporation did not act wrongfully in discharging the plaintiff because he participated in a shareholder derivative suit challenging the terms of the buy-back plan. *Id.* at 492-93. The dispute concerned matters internal to the corporation and did not implicate broader interests that

C. *Outside* Wilkes*'s Field of Influence*

Jurisdictions that reject *Wilkes*—most notably Delaware and New York—reject its linkage between a shareholder's interests as an investor and as an employee. In *Riblet Products Corp. v. Nagy*, the federal-court jury found that the corporation breached the terms of its employment contract with the plaintiff, allegedly at the behest of its controlling shareholders, whom it found also breached their fiduciary duties to the plaintiff.[145] The Seventh Circuit affirmed the jury's verdict on the breach of contract claim[146] but certified to the Delaware Supreme Court the question of whether Delaware law recognized the plaintiff's fiduciary-duty claim.[147] Answering the question no, the Delaware court emphasized the separateness of rights arising from the plaintiff's employment contract and his rights as a shareholder.[148] The court conceded that the corporation's controlling shareholders "may well owe fiduciary duties to [the plaintiff] as a minority shareholder . . . [b]ut that is not the issue here" because the plaintiff alleged no harm to himself as a shareholder, such as a wrongful freeze-out or injury to him as a shareholder stemming from termination of his employment.[149] Additionally, it is clear that under Delaware law the fact that a corporation is closely held does not itself warrant applying a distinct fiduciary standard to protect non-controlling shareholders.[150]

underlie public-policy exceptions to employment at-will. *Id.* at 493. The court explicitly differentiated between the plaintiff's wrongful-termination claim and his fiduciary duty claim and affirmed the trial court's judgment for the plaintiff on the fiduciary duty claim. *See id*. at 494.

145. Riblet Prod. Corp. v. Nagy, 683 A.2d 37, 38 (Del. 1996). The plaintiff alleged that the controlling shareholders' motive for firing him was "'to reduce their risk under [certain] guarantees.'" *Id.* at 40 n.4. Presumably, these guarantees are the ones given to lenders to fund the defendants' prior leveraged buy-out through which they acquired an 85% equity interest in the corporation. *Id.* at 38. The plaintiff, employed as the corporation's CEO, was entitled to significant post-termination benefits under his employment agreement unless he was discharged for cause. These were "'all salaries, benefits, bonuses, and other direct and indirect forms of compensation' for the remainder of [the] five-year term" of his employment contract. *Id.*

146. Nagy v. Riblet Prod. Corp., 79 F.3d 572 (7th Cir. 1996). The defendants argued that the plaintiff had been discharged for cause, which would eliminate his right to significant post-termination benefits. *Id.* at 574.

147. *Id.* at 577-78.

148. *Riblet Prod. Corp.*, 683 A.2d at 40.

149. *Id.*

150. *See* Nixon v. Blackwell, 626 A.2d 1366, 1380-81 (Del. 1993) (stating that it is "inappropriate . . . for [the] [c]ourt to fashion a special judicially-created rule for minority investors when" corporation has not elected formal treatment as a close corporation under corporation statute or "there are no negotiated special provisions in the certificate of incorporation, by-laws, or stockholder agreements").

Shareholders' capacity to agree to special terms authorized by the corporation statute—terms varying default norms in corporate law—delegitimates intervention by the court to vary the default terms.[151]

In contrast, the plaintiff in *Ingle v. Glamore Motor Sales, Inc.*, the leading New York case, was an employee at will with no explicit employment agreement whose stock was subject to a shareholders' agreement that gave the controlling shareholder the right to purchase it "'if [plaintiff] shall cease to be an employee of the Corporation *for any reason*.'"[152] The *Ingle* court held that the plaintiff had no basis on which to challenge his discharge, although the plaintiff alleged that it was motivated by the controlling shareholder's desire to acquire his shares.[153] The plaintiff, however, did not challenge the fairness of the price he received.[154]

Indeed, under New York law employees at-will who challenge the fairness of a mandatory stock repurchase fare no better than the *Ingle* plaintiff. In *Gallagher v. Lambert*, the plaintiff alleged he was fired by his employer so that its controlling shareholders would benefit through the corporation's repurchase of his 8.5% shareholding, having timed the plaintiff's termination so that it fell within the last month of the period in which the buyback price would be set at book value.[155] The court held that the plaintiff was bound by the explicit terms of the buy-back obligation, "[t]here being no dispute that the employer had the unfettered discretion to fire plaintiff at any time."[156]

To the *Gallagher* dissent, the majority conflated employment-law and corporate-law concerns: "[t]he court's insistence that the rationale of *Ingle* . . . must be carried over—lock, stock and barrel—even to the fiduciary obligations owed minority shareholders

151. *Id.* (observing that so to intervene would constitute "inappropriate judicial legislation" and would violate doctrine of independent legal significance).

152. Ingle v. Glamore Motor Sales, Inc., 535 N.E.2d 1311, 1312 (N.Y. 1989).

153. *Id.* at 1314.

154. *Id.*

155. Gallagher v. Lambert, 549 N.E.2d 136, 136-37 (N.Y. 1989). After that month, the benchmark for the buy-back price was the company's earnings. *Id.*

156. *Id*. at 138. The majority opinion points out that the plaintiff "helped write" the buy-back formula. *Id.* at 137. As the dissent notes, the majority opinion does not examine whether the implied covenant of good faith and fair dealing constrains the controlling shareholder's exercise of discretion to cause the corporation to terminate the plaintiff's employment for reasons unrelated to the corporation's business needs. *Id.* at 141. New York cases do not recognize the covenant's applicability to arguably opportunistic decisions to terminate employment. *See supra* note 34 and accompanying text. R

in close corporations, plainly represents an extension of the law to a different jural relationship."[157] In contrast with *Wilkes*, the NewYork court in *Gallagher* held that the force of New York's at-will default may trump even an employee's interests as an investor.[158] To be sure, *Gallagher* does not convert employment at-will from a default rule to a mandatory one, but metaphorically it enhances at-will's gravitational pull or field of force over other issues and legally-protected interests.

D. *Sticky Defaults Revisited*

The possibility that a default rule may be sticky affords a more theoretical perspective on these differences among jurisdictions, as well as how the *Wilkes* doctrine itself evolved. A starting point is the possibility that courts differ in their assessment of the limits of human cognition and capacity to address risk through explicit agreements, as well as the appropriateness of judicial interventions that reflect awareness of such limitations. Thus, the Delaware position, which emphasizes the availability of express contractual workarounds to default rules in corporate law and to the at-will default,[159] assumes a robust potential for anticipating or mitigating risk through explicit terms. If there is a gap between, on the one hand, the theoretical availability of alternatives to default rules that the parties to a transaction might prefer, and, on the other hand, the realistic prospect that those alternatives will be identified and implemented in enforceable explicit contract terms, Delaware courts limit their curative role, at least on the issues relevant to this Article.[160] The *Wilkes* doctrine, in contrast, is a plausible response

157. *Gallagher*, 549 N.E.2d at 139.

158. *Id.* at 141.

159. *See* Rizzitiello v. McDonald's Corp., 868 A.2d 825, 830 (Del. 2005) (rejecting argument that plaintiff had been constructively discharged in violation of contractual covenant of good faith and fair dealing and stating that "[i]n Delaware, there is a 'heavy presumption that a contract for employment, unless otherwise expressly stated, is at-will in nature, with duration indefinite'" (quoting E.I. DuPont de Nemours & Co. v. Pressman, 679 A.2d 436, 440 (Del. 1996))).

160. The court's holding in *Riblet Products* has been criticized on the basis that it "encourages the minority shareholder to take her chances and avoid getting her employment contract in writing." David A. Grooters, *Express Employment Contracts in a Close Corporation After* Nagy v. Riblet Products, Inc.*: To Put Them in Writing or Not To Put Them in Writing, That Is the Question*, 24 J. CORP. L. 123, 134 (1998). Although the author does not spell out the underlying intuition, it might look like this: if a minority shareholder seeks a written employment contract from a corporation with a controlling shareholder, it might well contain an express at-will term, depending (of course) on the employee's bargaining position. With no written contract, if the employee is discharged, the employee might be able to establish an enforceable contract on terms

to default-term stickiness in a relatively small set of transactional relationships that makes less heroic assumptions about parties' likely capacity to translate, into enforceable contract terms, insights theoretically available to them through foresight.

As the *Wilkes* doctrine evolved through application to additional fact patterns, its scope narrowed to relationships in which the at-will default may be especially sticky. These are typified by an employer of indeterminate status, high drafting costs relative to a risk that seems remote if it is recognized at all, and all in a setting that may deter explicit bargaining over explicit terms to govern termination of employment. Consider first the indeterminate status of employers like Springside at the time of its founding. Each of the four shareholders, now an employee and director as well as an investor, might well not perceive his new corporate employer as distinct from himself and his control over it. In contrast, employees who join later "and happen to" purchase stock are much less likely to misunderstand that their employer's identity and interests are distinct from their own.

Indeed, although critics of the at-will doctrine emphasize its origins in a power imbalance between employers and employees,[161] implicit in that imbalance is employees' awareness of it. Participating as a corporation's founding investor-shareholder may dull this awareness. Moreover, when a cohort of employees is distinctly empowered, as appears to be the case with public company CEOs, the at-will default vanishes. What may differentiate a start-up entity's founders from CEOs of public companies is their relative awareness of their employer's identity and interests, as well as possible changes in the entity's control structure over time. CEOs, although much more powerful than the rank-and-file work force in obtaining terms of employment that they desire, appear also to understand the vulnerability of their positions to decisions made by the company's board of directors. Founding shareholders, in contrast, may lack this awareness or feel it much less acutely, especially if no one bargains from a distinctly strong initial position.

Relatedly, as the court's narrative of Springside's origin suggests, founders may have limited funds to invest in any tailored drafting and, with limits on their own time and energy, choose to

other than at-will. And the absence of a written contract for at-will employment would, at worst, have no effect on a court's willingness to link employment status to treatment of the employee as an investor.

161. *See supra* note 55 and text accompanying note. **R**

devote them to their new business as opposed to negotiating explicit default-ousting terms.[162] If the risk of discharge from employment seems remote, more remote on the *Wilkes* facts than the risk of personal liability were the firm structured as a partnership, the at-will default may prove sticky.[163] Moreover, perhaps a founding shareholder who considers the question may incorrectly assume that the law prohibits discharging an employee without cause!

As discussed in Part II.C, theoretical accounts of sticky defaults suggest that parties may be inhibited from negotiating to oust a default term because they fear the adverse signals about themselves that may follow from raising an issue.[164] In the *Wilkes* context, the signaling story requires more complexity than the prospect that by demanding a just-cause standard, a would-be employee signals a propensity to shirk. Founding investors in small corporations and other entities like Springside who become both employees and participants in the corporation's governance have incentives not to shirk and thereby shortchange themselves as investors. However, a founding investor who insists on a just-cause standard may signal undue pessimism about the future of relationships among the founders or an unwelcome suspiciousness about her co-founders.

Thus, the alternate default rule adopted in *Wilkes* may reflect the sense that founders who propose a just-cause standard against an at-will default are more likely to be inhibited than are those who propose an at-will standard against a just-cause default, who might characterize the proposal as analogous to no-fault divorce and as a recognition that sometimes it's better for all to call a relationship over, even when no one is culpable. To be sure, a founding investor who affirmatively proposes adopting an at-will standard may signal to her fellow investors a propensity for intra-corporate conspiracies and expulsions. In contrast, proposing a buy-sell agreement could send a more benign signal, given the breadth of circumstances under which an initial investor may no longer be a shareholder. Perhaps—and this is an empirical question—in jurisdictions that follow *Wilkes*, buy-back and shareholder purchase rights are more

162. *See* Harvey Gelb, *Fiduciary Duties and Dissolution in the Closely Held Business*, 3 WYO. L. REV. 547, 568 (2003) (observing that at time of founding a new business entity, "[n]either clients nor their lawyers relished the prospects of incurring the delays or chilling effects of adversarial negotiations leading to the preparation of intricate legal documents").

163. *See id.* at 567 (observing that "[i]t is probable that in most cases involving closely-held businesses, the lure of limited liability and partnership tax benefits rather than entity governance considerations were the prime factors in choice of entity").

164. *See supra* Part II.C.

prevalent than are explicitly at-will employment contracts with shareholders. Only with the greater purchase that data provides could the cross-cutting theoretical possibilities of signaling be untangled.

Finally, *Wilkes* seems especially compelling as a solution to a sticky default when equity investment is not allocated in a pattern that creates a controlling interest that is likely to be stable over time. The anti-Wilkes faction within Springside that effected his ouster consisted of an ad hoc alliance among the other three shareholders.[165] This alliance did not exist when Springside was founded and, once it emerged, it might have proved short-lived. In contrast, when equity is, or has already been, allocated to create a controlling block of shares,[166] a minority shareholder is in a position analogous to an employee who invests in her employer's company, knowing of the power imbalance between them. When equity is equally allocated, as in *Wilkes*, there is no comparable imbalance and the founders are not likely "to conceive of [themselves] as plotting to use the employment-at-will doctrine against each other."[167] Thus, the at-will default may be especially sticky because putting an alternative on the agenda for discussion requires imagining how one's cofounders may discover and indulge their dark sides at some indeterminate time in the future.

CONCLUSION

Like much contemporary scholarship, this Article uses abstract theory—the sticky default thesis—both to structure how a situation is described and to assist in developing a normative account with which to evaluate the merits of a legal doctrine.[168] That the default rule of at-will employment may be sticky in situations like *Wilkes* is a basis on which to consider the merits of the court's replacement of at-will with an alternate default. Likewise, the sticky-default thesis casts a different light on jurisdictions that reject *Wilkes* by facilitat-

165. Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 660-61 (Mass. 1976).

166. An example is the Rodd family block in *Donahue.* Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 509-10 (Mass. 1975).

167. Gelb, *supra* note 162, at 567. R

168. Even skeptics about the broader merits of particular bodies of academic theory may acknowledge the value of a methodology that "yields surprises or insights about a familiar topic." Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure*, 112 YALE L.J. 829, 831 (2003).

ing comparative examination of underlying assumptions about patterns of conduct and what is feasible in a particular setting.