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Privacy Rights, Public Policy, and the Employment Relationship

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Two well-established common law doctrines increasingly are coming into conflict. The first protects individuals from unreasonable intrusions on their privacy. The second authorizes an employer to fire its employees at will, unless a clear agreement exists to the contrary. As employees have begun to assert their common law right of privacy[1] in the workplace, their claims have collided headlong with the doctrine of employment at will.

The conflict became apparent during the legal struggles over the permissibility of drug testing in the workplace. In a typical case, Richard Johnson, a twenty-three year employee of Carpenter Technology Corporation, was fired after he refused to submit to a suspicionless drug and alcohol urinalysis screen.[2] Because he was employed by a private firm, federal constitutional privacy protections did not apply.[3] And because he had been

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[1] In contemporary parlance, "rights" are often understood to protect the individual against the actions of the state. The tort of invasion of privacy is unusual among modern torts in referring to the interest it protects as a "right" which may be invoked against other private individuals. David Leebron has explored the intellectual roots of the privacy tort and how the rights-based conception of the common law it suggests is at odds with the fault-based conception of tort liability which emerged at the end of the nineteenth century and now predominates. *See* David W. Leebron, *The Right to Privacy's Place in the Intellectual History of Tort Law*, 41 CASE W. RES. L. REV. 769 (1991). Whatever its conceptual origins, the privacy tort is still discussed in terms of a "right," and I follow conventional terminology in this Article by referring to a common law "right of privacy."

[2] *See* Johnson v. Carpenter Tech. Corp., 723 F. Supp. 180, 181–82 (D. Conn. 1989).

[3] *See id.* at 185.

promoted to a supervisory position eighteen years earlier, Johnson could no longer rely on the just-cause provisions of the collective bargaining agreement.[4] Instead, Johnson alleged that his dismissal was wrongful because it violated a public policy protecting employee privacy rights.[5] Although acknowledging the existence of a common law right of privacy, the court found it insufficient to overcome the at-will doctrine and rejected Johnson's wrongful discharge claim.[6]

Sarah Borse, like Richard Johnson, was fired after many years of service when she refused to consent to suspicionless urinalysis drug testing and personal property searches by her employer.[7] She, too, claimed that her dismissal was wrongful, and the Third Circuit, applying Pennsylvania law, reached the opposite conclusion from the *Johnson* court.[8] Finding the common law tort of invasion of privacy to be evidence of a public policy protecting employee privacy, the court held that a discharge is wrongful despite the employee's at-will status where it is "related to a substantial and highly offensive invasion of the employee's privacy."[9] Other courts which have considered whether the common law right of privacy limits an employer's authority to fire an at-will employee for refusing to submit to drug testing are similarly divided.[10]

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[4] *See id.* at 181.

[5] *See id.* at 185.

[6] *See id.* at 186. Johnson also raised breach of contract claims in challenging his termination. *See id.* at 182. He alleged that the employer was bound by oral promises of job security made to induce him to accept a promotion and by the procedures set forth in its drug and alcohol policy manual. *See id.* at 182–83. Based on these allegations, the court denied summary judgment and permitted Johnson to proceed on his contract claims. *See id.* Nevertheless, its holding for the at-will employee, who cannot rely on any explicit agreement, is clear: common law privacy rights offer no protection against discharge for asserting those rights. *See id.* at 186.

[7] *See* Borse v. Piece Goods Shop, Inc., 963 F.2d 611, 613 (3d Cir. 1992).

[8] *See id.* at 626.

[9] *Id.* at 622.

[10] *Compare* Jennings v. Minco Tech. Labs, Inc., 765 S.W.2d 497, 499–502 (Tex. Ct. App. 1989) (rejecting plaintiff's claim of wrongful discharge based on invasion of common law right of privacy) *with* Twigg v. Hercules Corp., 406 S.E.2d 52, 55 (W. Va. 1991) (recognizing right of privacy as public-policy limitation on at-will rule) *and* Luedtke v. Nabors Ala. Drilling, Inc., 768 P.2d 1123, 1130 (Alaska 1989) (concluding that violation of public policy protecting employee privacy may breach covenant of good faith and fair dealing implied in at-will employment contract).*Cf.* Luck v. Southern Pac. Transp. Co., 267 Cal. Rptr. 618, 634–35 (Cal. Ct. App. 1990) (California constitutional right to privacy is not public-policy exception to at-will rule); Semore v. Pool, 266 Cal. Rptr. 280 (Cal. Ct. App. 1990) (California constitutional right of privacy is fundamental principle of public policy sufficient to state cause of action for wrongful termination).

The conflict between employee privacy rights and employer prerogative extends far beyond the issue of drug testing. Employers and employees have long struggled over the degree of privacy employees should be afforded while at work, and the legitimate scope of employer inquiries into their behavior off the job. Personal property searches, intrusive questionnaires, mandatory polygraph testing and pre-employment psychological screening all have faced legal challenges.[11] The recent introduction of new technologies into the workplace raises still more privacy issues. Employers now have an unprecedented ability to monitor virtually every aspect of an employee's activities throughout the day using video surveillance, electronic eavesdropping, and computer monitoring techniques.[12] In addition, computers make possible the compilation of vast amounts of information about the employee's financial status, buying habits and lifestyle off duty.[13] While employees complain that intrusive employer practices cause unnecessary stress and unfairly invade their privacy, employers argue that their increased ability to monitor employee behavior both on and off the job will improve productivity, lower health care costs, and reduce losses from theft and other employee misconduct.[14]

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[11] *See, e.g., Borse*, 963 F.2d 611 (drug testing and personal property search); Gretencord v. Ford Motor Co., 538 F. Supp. 331 (D. Kan. 1982) (vehicle search); Soroka v. Dayton Hudson Corp., 1 Cal. Rptr. 2d 77 (Cal. Ct. App. 1991) (psychological screen); Cort v. Bristol-Myers Co., 431 N.E.2d 908 (Mass. 1982) (questionnaire); K-Mart Corp. v. Trotti, 677 S.W.2d 632 (Tex. Ct. App. 1984) (search of employee locker and purse); Cordle v. General Hugh Mercer Corp., 325 S.E.2d 111 (W. Va. 1984) (polygraph testing).

[12] *See* U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, THE ELECTRONIC SUPERVISOR: NEW TECHNOLOGY, NEW TENSIONS (1987); L. CAMILLE HÉBERT, EMPLOYEE PRIVACY LAW § 8A.01 (1996). A recent survey of business executives found that 22% of respondents had engaged in searches of employee computer files, voice mail, and e-mail. Based on those results, it was estimated that some twenty million Americans may be subject to some kind of electronic monitoring or surveillance on the job. *See id.* (citing Charles Piller, *Bosses with X-Ray Eyes: Your Employer May Be Using Computers to Keep Tabs on You*, MACWORLD, July 1993, at 118, 120, 123).

[13] *See* Richard Lacayo, *Nowhere to Hide: Using Computers, High-Tech Gadgets and Mountains of Data, an Army of Snoops Is Assaulting Our Privacy*, TIME, Nov. 11, 1991, at 34; Jeffrey Rothfeder et al., *Is Nothing Private? Computers Know a Lot About You—And They're Quite Willing to Tell*, BUS. WK., Sept. 4, 1989, at 74; Jim Schachter, *U.S. Industry Does a Poor Job of Protecting Privacy, Study Says*, L.A. TIMES, Apr. 19, 1989, § 4 at 1.

[14] *See* 9 TO 5, WORKING WOMEN EDUCATION FUND, STORIES OF MISTRUST AND MANIPULATION: THE ELECTRONIC MONITORING OF THE AMERICAN WORKFORCE (1990); Pamela Burdman, *Employee Privacy in Peril in the High-Tech '90s*, S.F. CHRON., Aug. 11, 1992, at B1; Laurie Flynn, *Big Brother Is Watching You Work/Programs Monitor Use of Computers*, HOUSTON CHRON., June 20, 1993, at 4; Veronica Fowler, *Is the Boss Watching You While You Work?*, GANNETT NEWS SERV., Nov. 12, 1992; Carol Kleiman, *Delving into*

Although conflicts over workplace privacy are increasing, legal analysis of the issue remains fragmented. Typically, concerns about potentially invasive employer practices are discussed seriatim—Is polygraph testing unduly invasive? Does drug testing unfairly infringe on employee privacy? Should electronic monitoring be prohibited?—with each debate having little reference to the others. This fragmented way of thinking about workplace privacy is reflected in the structure of the law. A number of federal and state statutes regulate aspects of employee privacy, but each addresses only a particular, narrowly defined invasion. For example, separate federal statutes regulate the use of polygraph testing, credit reports, and medical examinations by employers.[15] Similarly, over half the states have statutes regulating the use of polygraphs in employment; at least fourteen limit employer drug testing plans; and nearly two dozen forbid adverse employment actions based on off-duty tobacco use.[16] No statute, however, deals with the issue of employee privacy in any comprehensive way.

My primary concern in this Article is with the privacy rights of unorganized, private-sector employees. Unlike public employees, they cannot turn to the Constitution for protection of their personal privacy,[17] nor can they

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Private Lives a Sticky Issue in Interviews, CHI. TRIB., Aug. 2, 1992, Jobs section at 1; Carol Kleiman, *Worker Privacy Right Puts Businesses to Test*, CHI. TRIB., July 23, 1989, Jobs section at 1; Lacayo, *supra* note 13, at 34; Ronald Rosenberg, *Most Workers in Survey Think Employers Use Electronic Means to Spy on Them*, BOSTON GLOBE, Mar. 9, 1989, at 10; Jeffrey Rothfelder et al., *Is Your Boss Spying on You? High-Tech Snooping in 'the Electronic Sweatshop,'* BUS. WK., Jan. 15, 1990, at 74.

[15] The Employee Polygraph Protection Act of 1988, 29 U.S.C. §§ 2001–2009 (1994), prohibits polygraph testing by private employers except in certain statutorily defined circumstances. The Fair Credit Reporting Act, 15 U.S.C. §§ 1681–1681t (1994), permits the use of consumer credit reports in making employment decisions, but imposes certain requirements relating to the disclosure and accuracy of the information. The Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (1994), regulates employer-mandated medical inquiries and examinations. *See* 42 U.S.C. § 12112(d).

[16] *See* MATTHEW W. FINKIN, PRIVACY IN EMPLOYMENT LAW 220–365 (1995); *see also* IRA MICHAEL SHEPARD ET AL., WORKPLACE PRIVACY, app. A (2d ed. 1989) (containing state-by-state listing of laws regulating specific aspects of employee privacy such as drug testing, polygraph testing, AIDS testing, medical screening, and prior criminal records).

[17] In rare cases, where a private employer is acting as an instrument or agent of the government, constitutional privacy protections may extend to workers in the private sector. *See* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 614 (1989); *cf.* Foster v. Ripley, 645 F.2d 1142, 1146–47 (D.C. Cir. 1981) (holding that First Amendment applies to private employment given extensive government involvement with employer); Holodnak v. Arco Corp., 514 F.2d 285, 289–90 (2d Cir. 1975) (same). In addition, a very few jurisdictions have held that the state constitutional right of privacy applies directly to private actors. *See, e.g.*, Hill v. NCAA, 865 P.2d 633, 648 (Cal. 1994); Nakano v. Matayoshi, 706

rely on any requirement of due process to check arbitrary employer actions. And with union membership rates among private sector employees barely above ten percent,[18] the vast majority have no collectively bargained agreement to limit the employer's prerogative to determine the terms and conditions of employment. For the typical private sector employee, the only general source of legal protection from unjustified employer intrusions is the common law.

Although the common law tort of invasion of privacy *does* offer protection against all manner of unreasonable intrusions on employee privacy, its application in the workplace is complicated by the conflicting right of the employer to terminate the relationship at will. Most courts that have considered the issue agree that an employer may be liable in tort for unreasonable intrusions on employee privacy *after the fact*. Thus, for example, liability for invasion of privacy may arise when an employer enters an employee's home without permission,[19] searches an employee's locker and purse,[20] or inquires into an employee's sexual relationship with her husband.[21] However, when the employer gives notice *in advance* that it intends to engage in the same intrusive practices, the protection offered by the common law tort is problematic. If the employee accedes to the employer's intrusive practices (or merely continues to work after receiving notice), her employer will likely assert that she consented to the intrusion as a defense to her claim that her privacy was wrongfully invaded.[22] If, on the other hand, she objects to the intrusion and is fired as a

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P.2d 814, 818 (Haw. 1985). The exceptions are extremely limited; generally, private employees receive little protection from either state or federal constitutions.

[18] *See* UNITED STATES BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 443 (1995).

[19] *See* Love v. Southern Bell Tel. & Tel. Co., 263 So. 2d 460 (La. Ct. App. 1972) (finding employer liable for invasion of privacy where supervisors entered employee's locked home after employee failed to appear for work).

[20] *See* K-Mart v. Trotti, 677 S.W.2d 632 (Tex. Ct. App. 1984) (stating that an employer search of employee locker and purse may give rise to liability for invasion of privacy).

[21] *See* Phillips v. Smalley Maintenance Servs., 435 So. 2d 705 (Ala. 1983) (finding that an employer may be liable for invasion of privacy for supervisor's inquiries into plaintiff's sexual relationship with her husband).

[22] The extent to which a defense of consent will be successful is unclear. As on so many issues relating to employee privacy, the courts appear to be divided. *Compare* Jennings v. Minco Tech. Labs, Inc., 765 S.W.2d 497, 500-02 (Tex. Ct. App. 1989) (noting that consent amounts to absolute defense in any tort action based upon invasion of privacy—plaintiff's economic circumstances are irrelevant) *with* Polsky v. Radio Shack, 666 F.2d 824, 829 (3d Cir. 1981) (holding that consent not valid if required as a condition of employment or continued employment) *and* Leibowitz v. H.A. Winston Co., 493 A.2d 111, 115 (Pa. Super. Ct. 1985) (finding consent not valid if given under compulsion). In Part V

result, the common law privacy tort provides no relief, because no invasion of her privacy has occurred. She has suffered the loss of her job, but no loss of privacy. It is at this point that the interpretation of the at-will doctrine becomes crucially important. If applied strictly, the employee cannot recover for the loss of her job either, and will be left without recourse, regardless how invasive the employer's threatened actions were, or how justified her refusal to comply with her employer's demands.

My central argument here is that any meaningful protection of employee privacy requires limitation of an employer's power to fire at will. I begin by exploring the current status of the employment at will doctrine in Part I. Although the employer's power to terminate is now limited in several significant respects, the vast majority of nonunionized private-sector employees still have little legal basis for challenging arbitrary dismissals. In Part II, I consider the wide variety of contexts in which a legal right of "privacy" has been invoked, and the resulting difficulty in precisely defining the contents of a general right of privacy. Rather than searching for a unitary definition which can explain every legal claim to privacy, I turn instead to the specific legal doctrine most relevant in the context of private employment: the common law tort of invasion of privacy. In Part III, I explore the structure of the common law tort of invasion of privacy and the role it plays in enforcing societal norms regarding personal privacy. Drawing on sociological literature describing patterns of human interaction, I argue that observation of those norms by others is critical to the individual's sense of self. Although the precise areas or aspects of life designated as private will vary depending upon the cultural context and the relationship between the parties, their significance lies in the entitlement they grant to the individual to determine whether and when to permit another access.

I next consider in Part IV how an individual's ordinary expectations of privacy might be affected by the existence of the employment relationship. Although privacy interests are inevitably compromised in the course of employment, I argue that the employer has legitimate access to those areas socially designated as highly private—what I call "core" privacy interests—only to the extent necessary to achieve the purposes of the employment. Further intrusions threaten the very interests the common law tort of invasion of privacy purports to protect. Part V addresses the arguments traditionally made in favor of a "free" market approach to employment contracts and their inadequacy in addressing concerns of employee privacy. Finally, in Part VI, I consider what an accommodation of employee privacy rights in an at-will

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below, I argue against a formalistic application of the doctrine of consent which fails to take account of the concrete circumstances under which employee acquiescence to intrusive employer practices is obtained.

regime might look like and conclude that the common law right of privacy should be recognized as a public-policy exception to the at-will doctrine.

I. THE EMPLOYMENT CONTEXT

The basic common law rule governing the employment relationship is easily stated: in the absence of an agreement to the contrary, the employment relationship is presumed to be at will, and either party may terminate it at any time. Just as the employee is free to quit her job for any reason at all, the employer may discharge an employee "for good cause, for no cause, or even for cause morally wrong, without being thereby guilty of legal wrong."[23]

On its face, the at-will rule is nothing more than a presumption. If the parties were silent as to the duration of employment at the time the relationship was entered into, the employment is presumed to be at will. The parties are always free to agree otherwise, by expressly contracting that the employment will last for a specified period of time. Although phrased in terms of a presumption, the at-will rule at times more nearly operated as a substantive rule establishing the terms of the employment relationship. Earlier this century, the presumption of at-will employment was applied with such vigor that it was virtually impossible to overcome.[24] Courts refused to enforce even explicit agreements of job security based on technical contract doctrines,[25] and the United States Supreme Court blocked legislative attempts to limit an employer's power to fire at will as unconstitutional interferences with freedom of contract.[26]

Eventually the Supreme Court reversed its position[27] and a number of statutes now include provisions forbidding the discharge of employees for certain enumerated reasons.[28] Although the statutory restrictions on an

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[23] Payne v. Western & Atl. R.R., 81 Tenn. 507, 519–20 (1884), *overruled on other grounds*, Hutton v. Watters, 179 S.W. 134, 138 (Tenn. 1915).

[24] *See* Clyde W. Summers, *The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment at Will*, 52 FORDHAM L. REV. 1082, 1097–99 (1984).

[25] *See, e.g.*, Skagerberg v. Blandin Paper Co., 266 N.W. 872 (Minn. 1936).

[26] *See* Adair v. United States, 208 U.S. 161, 174–75 (1908).

[27] *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33–34 (1937).

[28] For example, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1994), forbids discharge because of an employee's race, color, religion, sex, or national origin, and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (1994), and the Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (1994), similarly limit discriminatory discharges based on age or disability. Other federal laws prohibit employers from dismissing employees for asserting certain statutory rights. *See, e.g.*, National Labor Relations Act, 29 U.S.C. § 158 (1994) (stating that discrimination

employer's right to fire might appear numerous, they are generally narrow in scope and quite specifically defined. Rather than altering in any way the basic presumption, these restrictions on the employer's acknowledged prerogative to fire at will are understood as limited incursions necessary to advance other legislative purposes, such as assuring safe and healthful working conditions for workers.[29]

The strength of the at-will presumption has been more significantly eroded by common law developments. The once nearly irrebuttable presumption may now be overcome in a number of ways. The existence of an agreement permitting termination only "for cause" may be established not only by a written contract specifying a fixed term of employment, but by oral assurances of job security as well.[30] Personnel manuals specifying grounds and procedures for termination have been held to create enforceable obligations on the part of the employer, limiting its authority to terminate an employee at will.[31] At least one court has found that an employee's longevity of service, together with the employer's personnel practices and assurances of continued employment, create an implied contract not to terminate without cause.[32] Some courts have even been willing to enforce an "implied covenant of good faith and fair dealing" implicit in every employment contract.[33]

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against or discharge of employee for exercising rights under the NLRA is an "unfair labor practice"); Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) (1994) (stating that it is unlawful to discharge an employee for filing a complaint under the FLSA); Occupational Safety and Health Act, 29 U.S.C. § 660(c) (1994) (forbidding the discharge of employee for filing complaint pursuant to OSHA); Employee Retirement Income Security Act, 29 U.S.C. § 1140 (1994) (forbidding the discharge of an employee for exercising ERISA rights); and Family and Medical Leave Act, 29 U.S.C. § 2615(a) (1994) (prohibiting discharge of any individual for opposing any practice made unlawful by FMLA).

[29] *See, e.g.*, Marshall v. Intermountain Elec. Co., 614 F.2d 260, 262 (10th Cir. 1980).

[30] Although a guarantee of job security may be based on an oral statement, courts have generally looked to surrounding circumstances for evidence that the employer intended to make a binding promise before holding that an enforceable contract exists. Thus, assurances of job security made to encourage an employee to decline another offer of employment and stay on the job have been held to create a binding contract, *see* Shebar v. Sanyo Bus. Sys. Corp., 544 A.2d 377, 383 (N.J. 1988), while casual words of encouragement made outside the context of specific job negotiations generally are not sufficient. *See* Rowe v. Montgomery Ward & Co., 473 N.W.2d 268, 274–75 (Mich. 1991).

[31] *See, e.g.*, Duldulao v. Saint Mary of Nazareth Hosp. Ctr., 505 N.E.2d 314 (Ill. 1987); Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880 (Mich. 1980); Woolley v. Hoffmann-LaRoche, Inc., 491 A.2d 1257 (N.J.), *modified*, 499 A.2d 515 (N.J. 1985).

[32] *See* Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917 (Cal. Ct. App. 1981).

[33] *See, e.g.*, Mitford v. de Sala, 666 P.2d 1000 (Alaska 1983); Merrill v. Crothall-

In addition to contract theories, aggrieved employees have alleged various torts in challenging their terminations.[34] The most significant of these is wrongful discharge in violation of public policy. The public-policy exception to the at-will rule rests, not on the express or implied intent of the parties, but on external constraints imposed by the interests of the general community. In the classic fact pattern, an employer who fires an employee for refusing to commit a crime is liable for wrongful discharge. Despite an employee's at-will status, courts are willing to impose limits on an employer's power of dismissal when that power is wielded in a manner harmful to community interests.[35]

Numerous commentators, observing this weakening of the at-will presumption, have called for its complete abandonment.[36] Most critics of the

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American, Inc., 606 A.2d 96 (Del. 1992); Fortune v. National Cash Register Co., 364 N.E.2d 1251 (Mass. 1977); Monge v. Beebe Rubber Co., 316 A.2d 549 (N.H. 1974). Recognition of an implied covenant of good faith and fair dealing in employment contracts does not eliminate the at-will presumption, but merely carves out a limited exception when the employer is deemed to have acted in bad faith.

[34] In a few jurisdictions, breach of the implied covenant of good faith and fair dealing sounds in tort, *see, e.g.*, K-Mart Corp. v. Ponsock, 732 P.2d 1364, 1368–73 (Nev. 1987), although the trend is to limit good faith claims to contract damages. *See* ARCO Alaska, Inc. v. Akers, 753 P.2d 1150, 1153–54 (Alaska 1988); Foley v. Interactive Data Corp., 765 P.2d 373, 389–401 (Cal. 1988); Metcalf v. Intermountain Gas Co., 778 P.2d 744, 748 (Idaho 1989). Discharged employees have asserted other tort causes of action, such as intentional infliction of emotional distress and defamation, against their former employers, but these claims are usually directed at the manner or circumstances of the discharge rather than the reasons for the discharge itself. *See, e.g.*, Wilson v. Monarch Paper Co., 939 F.2d 1138 (5th Cir. 1991); Agis v. Howard Johnson Co., 355 N.E.2d 315 (Mass. 1976).

[35] *See, e.g.*, Petermann v. International Bhd. of Teamsters, 344 P.2d 25 (Cal. Dist. Ct. App. 1959) and cases cited *infra* notes 202–12.

[36] *See, e.g.*, Janice R. Bellace, *A Right of Fair Dismissal: Enforcing a Statutory Guarantee*, 16 U. MICH. J.L. REFORM 207 (1983) (proposing that states adopt statutory guarantees of protection for unjust discharge); William B. Gould IV, *The Idea of the Job as Property in Contemporary America: The Legal and Collective Bargaining Framework*, 1986 BYU L. REV. 885 (1986) (arguing for state legislation establishing a just cause standard for employment termination); Joseph Grodin, *Toward a Wrongful Termination Statute for California*, 42 HASTINGS L.J. 135 (1990) (arguing for just cause legislation); Arthur S. Leonard, *A New Common Law of Employment Termination*, 66 N.C. L. REV. 631 (1988) (arguing for judicial abandonment of the at-will presumption); Cornelius J. Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1 (1979) (arguing for judicial adoption of a just cause standard); Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56 (1988) (arguing for just cause statute); Jack Stieber & Michael Murray, *Protection Against Unjust Discharge: The Need for a Federal Statute*, 16 U. MICH. J.L. REFORM 319 (1983) (arguing for a federal statute protecting employees against unjust discharge); Clyde W.

rule have focused on its unfairness and the harsh effects it works on the individual employee, although a few writers have argued for doing away with the rule on grounds of economic efficiency.[37] Reformers have called for legislation establishing a "just cause" standard for dismissals, or judicial reformulation of the common law rule, replacing the at-will presumption with a "for cause" presumption.

Despite the many calls for reform, the at-will rule has retained its vitality and, if anything, has been regaining strength in recent years. Courts are once again raising the barriers to overcoming the at-will presumption. Contract theories, which once promised discharged employees a likely avenue of relief, are now easily defeated by simple modifications in employer practices. For example, the inclusion of a disclaimer in a personnel manual negates any claim that its provisions constitute an enforceable promise by the employer.[38] Similarly, courts have backed away from the implications of recognizing and enforcing an implied covenant of good faith and fair dealing in employment contracts. Thus, the practical reality for the vast majority of employees today is employment at will.[39] These employees have little recourse against arbitrary employer action unless the circumstances of their dismissal happen to fall into one of the narrowly defined exceptions to the rule.[40]

The at-will rule is not without its defenders, of course. The most prominent among them is Richard Epstein who argues in favor of the contract

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Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976) (arguing for a just cause statute).

[37] *See, e.g.*, Note, *Protecting At-Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980) (arguing that the at-will rule is inefficient because it fails to account for transaction costs and information barriers on contract bargaining); *cf.* Leonard, *supra* note 36, at 676–78 (arguing that economic considerations do not necessarily support retaining the at-will rule).

[38] *See, e.g.*, Robinson v. Christopher Greater Area Rural Health Planning Corp., 566 N.E.2d 768, 772 (Ill. App. Ct. 1991); Federal Express Corp. v. Dutschmann, 846 S.W.2d 282, 283 (Tex. 1993).

[39] Currently, less than 11% of private sector employees are union members, *see* UNITED STATES BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 443 (1995), and individual employment contracts providing for job security are extremely rare.

[40] In the early 1980s, Stieber and Murray estimated that some 140,000 nonunionized workers with more than six months service were discharged each year who would have been entitled to reinstatement under a just cause standard. *See* Stieber & Murray, *supra* note 36, at 322–24. Stieber and Murray's calculations were based on the assumption that 22% of nonagricultural workers are represented by labor organizations. *See id.* at 322. Since that time, union membership rates among private sector employees have declined further. *See supra* note 39.

at will on grounds of both fairness and utility.[41] His fairness argument is a familiar one—"[f]reedom of contract is an aspect of individual liberty" and ought not be restricted absent some principled justification.[42] Given its prevalence in the business world, he argues, those who would abolish the contract at will bear a heavy burden of justifying the infringement on the liberty of both employers and employees who prefer such arrangements.[43] Epstein further contends that the at-will contract in fact benefits both employers and employees by providing a low-cost mechanism for insuring against abuses on both sides.[44] Just as the threat of firing maintains employee discipline, the employee's power to quit is an effective means of limiting employer abuses, according to Epstein.[45] Moreover, this arrangement has the virtue of being informal and self-enforcing; either party can exercise its ultimate power to terminate a relationship which is no longer beneficial without having to resort to expensive litigation.[46]

The conflict between the employee's privacy rights and the employer's power to discharge at will could be viewed as an aspect of the debate over the wisdom of the at-will rule itself. Unjustified intrusions on employee privacy represent one form of abusive exercise of employer power under an at-will regime. Conversely, the adoption of a universal "just cause" standard would provide greater protection for employee privacy because refusal to submit to an unjustified invasion of privacy would be unlikely to constitute adequate cause for dismissal.[47] However, wholesale abandonment of the at-will rule seems

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[41] *See* Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984).

[42] *Id.* at 953–54.

[43] *See id.*

[44] *See id.* at 963–65.

[45] *See id.* at 966.

[46] *See id.* at 970.

[47] The decisions of arbitrators interpreting job security provisions of collective bargaining agreements show how a "just cause" standard would affect employee privacy rights. *See, e.g.*, Utah Power & Light Co., 94 Lab. Arb. (BNA) 233, 243 (1990) (Winograd, Arb.).

> The only way an employee may preserve his right of privacy is to refuse to permit the invasion of privacy in the first place and, thereby, to accept the possibility that he will be discharged. If the employee is correct in his position that the demand of his employer . . . is an improper invasion of privacy, the employee is justified in his refusal to obey his employer's order, and he is entitled to reinstatement . . . with full back pay . . . .

Id.

unlikely. Since 1987, when Montana passed a statute mandating good cause for employment dismissals,[48] efforts to enact just cause protections have died down. With little likelihood of legislative modification of the at-will rule, courts will increasingly confront the central question raised here: what happens when an employee's common law right of privacy comes into direct conflict with the employer's power to fire at will?

Clearly, the right to fire at will is not absolute. It has come into conflict with fundamental public concerns before, and yielded. Almost all the states recognize an exception to the at-will rule based on public policy. Even the staunchest defenders of employment at will acknowledge some legitimate exceptions to the rule, as when the performance of a public duty or the protection of a public right is threatened.[49] The disputed point, then, is not *whether* the at-will rule should be limited, but *when*. I argue in this Article that protection of employee privacy warrants limitation of an employer's prerogative to fire at will. Employee privacy rights are equally fundamental to and no different in kind than interests which have already been widely acknowledged as exceptions to the at-will rule. Of course, any proposal to further limit the at-will rule must meet the arguments of Epstein and others that legal incursions on the contracting process are not only unnecessary but inefficient as well. In Part V, *infra*, I consider in greater detail the classical economic arguments against recognizing further exceptions to the at-will rule, and conclude that they are inadequate to decide issues of individual privacy in the employment context. But first, a fuller account of privacy is needed—what it means, why it is valued, and what is its legal status. It is to these questions that I now turn.

II. THE CONCEPT OF PRIVACY

The concept of privacy as a distinct legal right originated with Warren and Brandeis's famous 1890 article entitled *The Right to Privacy*.[50] In it, they argued that the existing common law recognized a principle of "inviolate personality" which could be invoked to protect the privacy of the individual.[51] Although arguing eloquently for explicit recognition of a right to privacy, they offered little in the way of definition, beyond locating privacy as "part of the more general right to the immunity of the person—the right to one's

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[48] *See* Montana Wrongful Discharge From Employment Act, MONT. CODE ANN. §§ 39-2-901 to -914 (1991) (originally enacted in 1987).

[49] *See* Epstein, *supra* note 41, at 952.

[50] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

[51] *See id.* at 205.

personality."[52] Soon after, the first courts began to recognize a tort cause of action for invasion of privacy, often expressly relying on the Warren and Brandeis article.[53] Since then, acceptance of a common law right of privacy has spread, such that it is now recognized in virtually all American jurisdictions.[54]

In a parallel development, the concept of privacy has made its way into constitutional jurisprudence. Although nowhere mentioned in the Constitution, privacy has been found to be protected by the "penumbras" of the Bill of Rights, as well as by several specific amendments to the Constitution. A general constitutional right of privacy protects at least two types of interests: "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions,"[55] such as those relating to marriage, procreation, and childrearing.[56] More specific protections are found in the First Amendment, which protects "privacy in [one's] associations,"[57] and the Fifth Amendment, which guards "the right of each individual 'to a private enclave where he may lead a private life,'" through strict application of the privilege against self-incrimination.[58] The concept of privacy is also central to interpreting the Fourth Amendment, for it prohibits unreasonable intrusions whenever an individual has a reasonable "'expectation of privacy.'"[59]

As its legal significance has grown, privacy has increasingly become the subject of academic debate. Some writers have argued that the concept of privacy is wholly "derivative" of other more fundamental rights,[60] and that its

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[52] *Id.* at 207.

[53] *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 117, at 850 (5th ed. 1984). After an initial setback when the New York Court of Appeals rejected the existence of such a right in *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902), the common law right of privacy was decisively recognized in 1905 by the Georgia Supreme Court in *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905). *See* KEETON ET AL., *supra*, § 117, at 851. *Pavesich* became the leading case on which other courts relied in finding a common law right of privacy. *See id.*

[54] *See* KEETON ET AL., *supra* note 53, § 117, at 851; RESTATEMENT (SECOND) OF TORTS § 652A cmt. a (1977).

[55] Whalen v. Roe, 429 U.S. 589, 599-600 (1977) (footnotes omitted).

[56] *See id.* at 600 n.26.

[57] *See* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 467 (1977); Buckley v. Valeo, 424 U.S. 1, 64 (1976); NAACP v. Alabama, 357 U.S. 449, 462 (1958).

[58] Tehan v. United States, 382 U.S. 406, 416 (1966) (quoting United States v. Grunewald, 233 F.2d 556, 581-82 (2d Cir. 1956) (Franklin, J., dissenting) *rev'd* 353 U.S. 391 (1957)).

[59] Terry v. Ohio, 392 U.S. 1, 9 (1968) (quoting Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

[60] *See* Frederick Davis, *What Do We Mean By "Right to Privacy"?*, 4 S.D. L. REV. 1,

recognition as a legal right is "a mistake."[61] Others have defended it in the most exalted terms, as necessary for "human dignity and individuality"[62] and "essential to democratic government."[63] Privacy has been linked with the most fundamental of values—personal autonomy, liberty, and the basic human relationships of love, friendship, and trust.[64] It has also been decried as a "petty" tort.[65]

Despite the importance many ascribe to it, privacy has proven difficult to define. This difficulty arises in part because of the variety of doctrinal sources found to offer protection from intrusions on privacy. Under the common law tort of invasion of privacy, private actors have been held liable for unauthorized entry into a private home,[66] commercial appropriation of an individual's name or likeness,[67] and publishing embarrassing private facts about an individual.[68] Constitutional privacy rights have been invoked to protect individual decisions regarding contraception,[69] abortion,[70] and the withdrawal of life support.[71] First Amendment privacy concerns have prohibited the compelled disclosure of one's associational ties,[72] as well as the criminalization of private possession of sexually explicit materials.[73] And

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20 (1959) ("Invasion of privacy is, in reality, a complex of more fundamental wrongs. . . . [T]he individual's interest in privacy itself, however real, is derivative and a state better vouchsafed by protecting more immediate rights."); *see also* Judith J. Thomson, *The Right to Privacy*, 4 PHIL. & PUB. AFF. 295, 313 (1975) (arguing that the right to privacy is derivative because any claimed violation of privacy can be explained in terms of some other right without resorting to a notion of privacy).

61 Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 327 (1966).

62 Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 1003 (1964).

63 Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 455 (1980).

64 *See, e.g.*, Stanley I. Benn, *Privacy, Freedom, and Respect for Persons*, *in* NOMOS XIII: PRIVACY 1-26 (J. Roland Pennock & John W. Chapman eds. 1971) (autonomy); Charles Fried, *Privacy*, 77 YALE L.J. 475 (1968) (love, friendship, and trust); Robert B. Hallborg, Jr., *Principles of Liberty and the Right to Privacy*, 5 LAW & PHIL. 175 (1986) (liberty).

65 Kalven, *supra* note 61, at 328.

66 *See* Gonzalez v. Southwestern Bell Tel. Co., 555 S.W.2d 219 (Tex. Civ. App. 1977).

67 *See* Pavesich v. New England Life Ins. Co., 50 S.E. 68 (Ga. 1905).

68 *See* Briscoe v. Reader's Digest Ass'n, 483 P.2d 34 (Cal. 1971).

69 *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

70 *See* Roe v. Wade, 410 U.S. 113 (1973).

71 *See In re* Quinlan, 355 A.2d 647 (N.J. 1976).

72 *See* NAACP v. Alabama, 357 U.S. 449 (1958).

73 *See* Stanley v. Georgia, 394 U.S. 557 (1969).

courts have found the Fourth Amendment to protect an individual's "reasonable expectation of privacy" not only from physical intrusions into one's home or office,[74] but also from intrusion by various monitoring devices, such as eavesdropping equipment and electronic tracking devices.[75]

Faced with this vast array of cases, some commentators conclude that the concept of privacy has taken in so much that it collapses of its own weight. In their view, there is no core, essential meaning of "privacy." Instead, the term refers to a collection of loosely related but distinct interests. Rather than being a useful concept, "privacy" clouds our understanding by obscuring the true underlying interests at stake. We would do better, these reductionists argue, to identify explicitly and protect directly the more fundamental interests that underlie the diverse claims of privacy.[76]

Other writers vigorously reject the reductionist approach, asserting that privacy is a fundamental right, decisively at stake in most, if not all, the reported cases. In order to save privacy as a legal concept, they offer definitions identifying the unique, irreducible interests it protects. Some invoke broad principles of individuality, personality, and human dignity.[77] Such efforts, however, remain vulnerable to the reductionists' charge that the concept of privacy is so vague as to have no fixed meaning. Other writers, recognizing this problem, but equally determined to defend the fundamental importance of privacy, propose more limited definitions in order to identify

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[74] *See* Camara v. Municipal Court, 387 U.S. 523 (1967) (private dwelling); Mancusi v. DeForte, 392 U.S. 364 (1968) (office).

[75] *See* Berger v. New York, 388 U.S. 41 (1967) (use of eavesdropping device); United States v. Karo, 468 U.S. 705 (1984) (use of electronic tracking device).

[76] *See, e.g.*, Davis, *supra* note 60, at 20; Kalven, *supra* note 61, at 327 ("[P]rivacy seems a less precise way of approaching more specific values, as, for example, in the case of freedom of speech, association, and religion[.]"); William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960) ("The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common . . . ."); Thomson, *supra* note 60, at 313 ("[I]t is possible to explain in the case of each right in the cluster how come we have it without ever once mentioning the right to privacy."); Raymond Wacks, *Introduction*, *in* PRIVACY I, at *xii* (Raymond Wacks ed., 1993) ("The concept of 'privacy' has become too vague and unwieldy a concept to perform useful analytical work."); Raymond Wacks, *The Poverty of 'Privacy,'* 96 LAW Q. REV. 73, 88 (1980) (The concept of privacy is so "attenuated, confused and overworked" it seems "beyond redemption."); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 299 (1983) ("[A]s a descriptive or analytic term, 'right to privacy' is virtually meaningless.").

[77] *See, e.g.*, Bloustein, *supra* note 62, at 1002–06; Paul A. Freund, *Privacy: One Concept or Many*, *in* NOMOS XIII: PRIVACY, *supra* note 64, at 182–98.

when a loss of privacy is threatened. Some have focused on an individual's control over the flow of personal information.[78] Others have emphasized restricting accessibility to the individual.[79] Still others have defined privacy in terms of personal autonomy.[80] Despite these many efforts, no widely accepted,

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[78] *See, e.g.*, ALAN F. WESTIN, PRIVACY AND FREEDOM 7 (1967) ("Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."); Elizabeth L. Beardsley, *Privacy: Autonomy and Selective Disclosure*, *in* NOMOS XIII: PRIVACY, *supra* note 64, at 56–70 (arguing privacy involves the right of selective disclosure of information about one's self); Fried, *supra* note 64, at 482 ("Privacy . . . is the *control* we have over information about ourselves." (emphasis in original)).

Some scholars have attempted to avoid any normative cast to the concept of privacy by rejecting the focus on control and defining it instead as a discernible *condition*. For example, privacy has been defined as "the condition of not having undocumented personal information about oneself known by others," W.A. Parent, *A New Definition of Privacy for the Law*, 2 LAW & PHIL. 305, 306 (1983), and "the condition of human life in which acquaintance with a person or with affairs of his life which are personal to him is limited." Hyman Gross, *The Concept of Privacy*, 42 N.Y.U. L. REV. 34, 36 (1967) (emphasis removed). Where this approach is taken, a further step is needed to give content to a "right" of privacy. *See, e.g.*, Parent, *supra*, at 309–12.

[79] *See, e.g.*, Richard B. Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275 (1974). Parker defines privacy as "*control over when and by whom the various parts of us can be sensed by others.*" *Id.* at 281 (emphasis in original). Although Parker shares with Westin and Fried the belief that an important aspect of privacy relates to individual control, he argues that their focus on control over *information* is both overly broad and too narrow. *See id.* at 279–80. Rather, Parker argues that privacy and control over personal information are related in this way: we use our privacy to protect personal information and, conversely, the dissemination of personal information makes one's privacy both less valuable and less secure. *See id.* at 284–85.

Gavison relates these concepts of physical accessibility and control over information in a somewhat more complex definition of privacy, arguing that privacy is composed of the three distinct, but interrelated elements of secrecy, anonymity, and solitude. *See* Gavison, *supra* note 63, at 428. Privacy may be lost as others obtain information about, pay attention to, or gain physical access to an individual. *See id.*

[80] *See* Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 236 (1977) (Privacy is "an autonomy or control over the intimacies of personal identity. . . . [W]hatever its sources of derivation and protection, [it] is but *one* concept—and is thus definable."). Others who speak of the right of privacy in terms of "autonomy" come closer to the reductionist position that "privacy"—at least as used in many recent constitutional cases—may be more precisely identified as synonymous with "autonomy" rather than protecting a distinct but related interest. *See* Joel Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?*, 58 NOTRE DAME L. REV. 445, 446–57 (1983); Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1424–29 (1974). Rubenfeld takes a different approach in relating the constitutional right of privacy to

authoritative definition of privacy has emerged.[81]

In discussing employee privacy rights, I intend to sidestep the definitional controversies which have plagued general discussions of privacy. I leave aside here the debates over whether "privacy" has any conceptual coherence, whether it is one right or many, and whether it is independent or derivative of more fundamental rights. While these are important philosophical issues, concrete questions about how far protection for employee privacy ought to extend in the face of employer authority cannot and need not await their resolution. Rather than searching for some global definition of privacy which can explain all of the cases decided in its name, I focus instead on the legal doctrine on which the private sector employee must rely for protection—the common law tort of invasion of privacy. By doing so, I do not intend to say anything universal about the nature of privacy rights in all contexts, nor to contest the validity of other types of claims traditionally made under the rubric of privacy, such as the right to make decisions regarding procreation or family relationships free from government interference. A formal definition of privacy is unnecessary here, because I am not so much concerned with the precise boundaries of what is or should be considered private, as with how certain matters that *are* considered private in our society generally should be treated in

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autonomy interests, arguing that privacy is concerned not so much with prohibiting state interference with certain "fundamental" activities, as with preventing a law's affirmative effects when it threatens to determine the course of an individual's life. *See* Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 740 (1989).

[81] Part of the reason no authoritative definition of privacy has emerged is that commentators tend to focus only on those cases which illustrate their particular concerns and to disregard the rest. For example, writers concerned about access to personal information dismiss the constitutional autonomy cases as not involving "true" privacy interests. *See, e.g.*, Gavison, *supra* note 63, at 436; Gross, *supra* note 78, at 38; Parent, *supra* note 78, at 312-22. Others who focus on the right of privacy in making certain fundamental decisions, such as those relating to procreation, ignore the common law and Fourth Amendment cases. *See, e.g.*, Rubenfeld, *supra* note 80, at 740. To the extent that they are describing different sets of data, it should not be surprising that there is no convergence on any single definition of privacy. In a similar manner, I focus in this Article on the legal doctrines which have the greatest relevance to the issue of workplace privacy—primarily the common law tort of intrusion on seclusion and, to a lesser extent, the Fourth Amendment test of "reasonable expectations of privacy." The reductionists very well may be right that no single definition or concept is capable of explaining all of the legal cases actually decided in the name of privacy. However, it does not necessarily follow that it ceases to be useful to speak of privacy. It is possible that privacy as a legal concept should only be applied to certain types of cases, or that privacy is best understood not as a single right, but a cluster of related rights. I do not and need not resolve any of these questions in this Article.

the employment setting. By examining the common law privacy tort and its legal structure, I hope to illuminate the role that privacy norms play in our social life and the reasons they are sometimes enforced by law, in order to determine how they should be applied to the employment relationship.

III. THE COMMON LAW TORT

The common law tort of invasion of privacy is generally understood to apply in four distinct but related situations. The right of privacy may be invaded by (a) "unreasonable intrusion upon the seclusion of another"; (b) "appropriation of the other's name or likeness"; (c) "unreasonable publicity given to the other's private life"; or (d) "publicity that unreasonably places the other in a false light before the public."[82] This typology derives from William Prosser's 1960 article, *Privacy*, in which he argued that the tort encompasses four distinct interests with little in common but their name.[83] Other scholars, most notably Edward Bloustein, strongly disagreed, asserting that a single important interest—the protection of human individuality and dignity—underlies the broad range of cases brought under the doctrine.[84] Whether or not Bloustein was right, Prosser's division of the tort into four parts has become enshrined in the law. Since their adoption in the *Restatement (Second) of Torts*, the four types of privacy tort have developed sufficiently independently that each may be discussed as a distinct cause of action.[85]

My focus here is on the first type, because the privacy issues typically raised in the workplace—for example, concerns about personal searches, electronic surveillance, and invasive testing procedures—are most readily analyzed as "intrusions on seclusion." Claims based on the appropriation, publicity, and false light torts may also be alleged against employers, but they

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[82] RESTATEMENT (SECOND) OF TORTS § 652A (1977).

[83] Prosser, *supra* note 76, at 389.

[84] *See* Bloustein, *supra* note 62, at 1000–03.

[85] The four forms of invasion of privacy set forth in the Restatement are "the ones that [had] clearly become crystallized and generally been held to be actionable" at that time. RESTATEMENT (SECOND) OF TORTS § 625A, cmt. c (1977). Comment c to section 652A specifically states that "[n]othing in this Chapter is intended to exclude the possibility of future developments in the tort law of privacy." *Id.* In particular, it mentions the possibility that privacy concerns related to "various types of governmental interference" and "the compilation of elaborate written or computerized dossiers" may lead to expansion of the four forms of the invasion of privacy tort or the establishment of new forms. *Id.* Nevertheless, the Restatement listing of four types of invasion of privacy has had an inhibiting effect on the development of the tort. Courts considering claims of tortious invasion of privacy almost invariably recite the four Restatement categories and base their judgments on the fit between the facts before them and the existing forms of the tort.

are generally analyzed in the same manner as like claims arising outside the employment context[86] and therefore, I will not consider them in detail here. Whether or not an alleged intrusion is "unreasonable," however, depends to a large extent on the context in which it occurs. In the next section, I explore how the existence of an employment relationship might affect the reasonableness of certain intrusions by the employer, but first I examine here the structure and meaning of the common law tort of "intrusion on seclusion" more generally.

The paradigm intrusion case occurs when someone enters a private space, such as a person's home, hotel room, or hospital room without permission.[87] Unlawful intrusions, however, need not be physical; what the common law tort seeks to protect is *not* merely physical space, but an individual's "private affairs or concerns."[88] Thus, it not only prohibits traditional forms of spying, such as using binoculars to peer into the windows of a home,[89] but extends protection to private activities and conversations[90] and certain types of sensitive information as well.[91]

In order to be actionable, the intrusion must be "highly offensive to a reasonable person."[92] On one level, this element of the tort protects defendants

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[86] *See, e.g.*, Young v. Jackson, 572 So. 2d 378 (Miss. 1990) (employee alleges public disclosure of private facts); Diamond Shamrock Refining v. Mendez, 809 S.W.2d 514 (Tex. Ct. App. 1991) (employee alleges false light tort), *aff'd in part, rev'd in part*, 844 S.W.2d 198 (Tex. 1992); Staruski v. Continental Tel. Co., 581 A.2d 266 (Vt. 1990) (employee claim based on appropriation of name and likeness). Because qualified privilege is generally recognized as an affirmative defense to the publicity and false light torts, the employment context may be relevant in evaluating a defendant employer's claim that its communications were privileged. However, the initial analysis of an employee's affirmative claim for tortious invasion of privacy of these two types against her employer does not differ materially from such claims made in other contexts.

[87] *See, e.g.*, Noble v. Sears, Roebuck and Co., 109 Cal. Rptr. 269 (Cal. Dist. Ct. App. 1973) (hospital room); Byfield v. Candler, 125 S.E. 905 (Ga. Ct. App. 1924) (stateroom on ship); Gonzalez v. Southwestern Bell Tel. Co., 555 S.W.2d 219 (Tex. Civ. App. 1977) (home).

[88] RESTATEMENT (SECOND) OF TORTS § 652B (1977).

[89] *See* Souder v. Pendleton Detectives, 88 So. 2d 716 (La. Ct. App. 1956). Unjustified use of viewing devices in traditionally private places like a public restroom or dressing room may also give rise to liability. *See* Doe by Doe v. B.P.S. Guard Servs., Inc., 945 F.2d 1422 (8th Cir. 1991); Harkey v. Abate, 346 N.W.2d 74 (Mich. Ct. App. 1983).

[90] *See* LeCrone v. Ohio Bell Tel. Co., 201 N.E.2d 533 (Ohio Ct. App. 1963); Roach v. Harper, 105 S.E.2d 564 (W. Va. 1958).

[91] *See, e.g.*, Phillips v. Smalley Maintenance Servs., Inc., 435 So. 2d 705 (Ala. 1983) (sexual information).

[92] RESTATEMENT (SECOND) OF TORTS § 652B (1977).

from the claims of the "neurotically thin-skinned"[93] by imposing an objective standard. But the requirement of "offensiveness" operates on another level as well, as a reference to community norms. Robert Post has developed extensively this link between the common law privacy tort and the observance of social norms.[94] He points out that the "reasonable person" is an abstraction, an analytical device created to embody "'the general level of moral judgment of the community.'"[95] Not simply an empirical or statistical "average" of the beliefs or experiences of people in the community, the reasonable person is "a genuine instantiation of community norms."[96] By requiring a plaintiff to show that a particular intrusion was "highly offensive to a reasonable person," the law identifies and enforces "those social norms whose violation would appropriately cause affront or outrage."[97]

To explain why the common law is concerned with maintaining certain social norms, Post turns to the sociological literature. In particular, he relies on Erving Goffman's account of rules of deference and demeanor[98] which regulate, respectively, one's recognition of others and presentation of self. These rules of deference and demeanor, or "civility rules" as Post calls them, establish the individual's position in the community. Recognition of one's unique self cannot be achieved by the individual alone, but is "a product of joint ceremonial labor"—"a chain of ceremony" with each giving to, and receiving in turn deference from, others.[99] It is in this sense that individual personality may be understood as constituted by the observance of civility rules by others.

Although other common law doctrines are also concerned with maintaining basic "civility rules,"[100] the privacy tort is particularly concerned with those

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[93] *Roach*, 105 S.E.2d at 566.

[94] *See* Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957 (1989).

[95] *Id.* at 961 (citing 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 16.2 (1956)).

[96] *Id.*

[97] *Id.* at 962.

[98] Rules of deference define conduct by which a person conveys appreciation "*to* a recipient or *of* this recipient, or of something of which this recipient is taken as a symbol, extension, or agent." Rules of demeanor define conduct by which a person expresses "to those in his immediate presence that he is a person of certain desirable or undesirable qualities."

Id. (quoting E. GOFFMAN, *The Nature of Deference and Demeanor*, *in* INTERACTION RITUAL: ESSAYS ON FACE-TO-FACE BEHAVIOR 56, 77 (1967)).

[99] *Id.* at 963.

[100] Obvious examples are the common law actions for defamation and intentional infliction of emotional distress.

norms which regulate personal boundaries. The sociological concept of "territories of the self"[101] roughly captures this concern. A territory is "a field of things" or "a preserve" over which the individual claims a right to control access or use.[102] The prototypical preserve is a fixed space, but the notion of a territory may also extend to the body, one's personal effects, certain types of information, and communications with limited others.[103] By respecting the boundaries of these territorial preserves, the society acknowledges and affirms the existence of the individual. Thus, as Reiman writes:

> *Privacy is a social ritual by means of which an individual's moral title to his existence is conferred.* Privacy is an essential part of the complex social practice by means of which the social group recognizes—and communicates to the individual—that his existence is his own.[104]

Of course, not every violation of privacy norms warrants legal intervention. Some intrusions are so trivial that they will be experienced by most people as mere annoyances or rudeness. The intensity of social life inevitably results in frequent minor territorial offenses. These breaches of social norms are easily repaired through ritual interchanges—a simple apology is the most obvious example—which are designed to affirm the norm violated and to vindicate the victim's claim to basic forms of respect.[105] The common

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[101] ERVING GOFFMAN, *The Territories of the Self*, *in* RELATIONS IN PUBLIC 28–61 (1971). Goffman's essay is primarily concerned with the study of face-to-face interactions and the territorial claims of the individual which structure social organization in that context. In writing about privacy, I mean to indicate territorial claims which operate in a broader sense—not only against other individuals but also against organized entities, including governmental and corporate actors. Although this broader understanding of territorial claims goes beyond Goffman's original focus, the fact that these organizational entities typically must act through an agent makes the difference less significant than it might at first seem. In any case, Goffman's concept of "territorial preserves" provides a useful starting point in understanding the nature of the claims underlying the privacy tort.

[102] *Id.* at 28–29.

[103] *See id.* at 30–41.

[104] Jeffrey H. Reiman, *Privacy, Intimacy and Personhood*, 6 PHIL. & PUB. AFF. 26, 39 (1976).

[105] In an essay entitled *Remedial Interchanges*, Goffman describes the corrective process which occurs in response to the inevitable minor breaches of the social order:

> [T]he complete cycle of crime, apprehension, trial, punishment, and return to society can run its course in two gestures and a glance. Justice is summary. The individual . . . must be prepared to do penance and provide reparations on the spot in exchange for being accepted back into good graces a moment later. . . . [S]ince interactional offenses pertain mainly to claims regarding territories of the self, and since

law, however, is only concerned with the most serious of these territorial violations,[106] those which threaten an individual's identity by withdrawing the deference normally afforded a member of the community. By limiting actionable intrusions to those which would "cause mental suffering, shame or humiliation to a person of ordinary sensibilities"[107] the common law steps in only when a violation "potentially places the plaintiff outside of the bounds of the shared community."[108] In such a situation, the common law tort serves as a vindication for the plaintiff, a reaffirmation of her status as a member of the community.

The significance of a loss of privacy is highlighted by what Goffman calls "total institutions"—places where "all aspects of life are conducted in the same place and under the same single authority."[109] In the total institution—for example, a prison or mental hospital—the inmates are placed outside the bounds of the general community because of their criminal or deviant acts. Their marginal status is emphasized by the extreme loss of privacy characteristic of these places:

> [B]eginning with admission a kind of contaminative exposure occurs. On the outside, the individual can hold objects of self-feeling—such as his body, his immediate actions, his thoughts, and some of his possessions—clear of contact with alien and contaminating things. But in total institutions these territories of the self are violated; the boundary that the individual places between his being and the environment is invaded and the embodiments of self profaned.[110]

> these claims amount to expectations regarding forms of respect, remedies will be ritual, that is designed to portray the remorseful attitude of the offender to an offended object of ultimate value.

ERVING GOFFMAN, *Remedial Interchanges*, *in* RELATIONS IN PUBLIC, *supra* note 101, at 107 (footnote omitted). Although Goffman's primary focus is on the role these rituals play in maintaining social control—that is, deterring further infractions of social norms—the privacy tort is concerned, in egregious cases, with redressing the harm to the individual suffering the violation as well.

[106] Post points out that the common law's limited focus on only the most egregious offenses is essential to prevent a flood of trivial lawsuits, as well as to preserve the flexibility and vitality of social life. *See* Post, *supra* note 94, at 975.

[107] Billings v. Atkinson, 489 S.W.2d 858, 859 (Tex. 1973).

[108] Post, *supra* note 94, at 968.

[109] ERVING GOFFMAN, ASYLUMS 6 (1961).

[110] *Id.* at 23. Goffman catalogs the invasions: facts about the individual's social status and past behavior—especially discreditable facts—are collected, recorded, and made available to staff; physical possessions are examined, catalogued, and taken away; the individual's physical person is searched, photographed, weighed, and fingerprinted. *See id.*

By disrupting or defiling "precisely those actions that in civil society have the role of attesting to the actor and those in his presence that he has some command over his world,"[111] the procedures of the total institution communicate to the inmates that they are set apart from the rest of society.

Understanding the privacy tort as safeguarding "civility rules" helps to explain certain aspects of its legal structure.[112] From its first articulation by Warren and Brandeis, the common law right of privacy has been linked to the principle of "an inviolate personality."[113] This link becomes explicable once it is recognized that the common law tort is concerned with maintaining basic forms of respect for the individual. Because the observance of fundamental social norms by others is a crucial constituent of individual personality, violation of these norms is itself harmful, independent of any measurable damages. Therefore, the common law does not require the plaintiff to prove any physical injury,[114] or consequential harm from an invasion of privacy in order to recover. Indeed, a defendant may be liable for an invasion of privacy even when the plaintiff cannot prove that she was actually observed, or that any private information was obtained, because the intrusion *itself* is wrongful.[115] According to the Restatement, a plaintiff is entitled to damages for "the harm to his interest in privacy resulting from the invasion" *in addition to* recovery

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at 16–24. Further losses of privacy result from collective sleeping and bathing arrangements, doorless toilets, and constant surveillance. *See id.* at 24–25.

[111] *Id.* at 43.

[112] Post, *supra* note 94, at 964–65.

[113] Warren & Brandeis, *supra* note 50, at 205. Courts have described the common law privacy tort in similar terms, as protecting one's "psychological solitude" and "inviolate personality." *See, e.g.*, Phillips v. Smalley Maintenance Servs., Inc., 435 So. 2d 705, 710 (Ala. 1983); Jaubert v. Crowley Post-Signal, Inc., 375 So. 2d 1386, 1388 (La. 1979).

[114] *See* K-Mart Corp. v. Trotti, 677 S.W.2d 632, 638 (Tex. Ct. App. 1984) (noting intrusion itself is actionable even without physical detriment); Roach v. Harper, 105 S.E.2d 564, 568 (W. Va. 1958) (finding no allegation of special damages necessary; invasion itself gives right to recover).

[115] *See* Doe by Doe v. B.P.S. Guard Servs., Inc., 945 F.2d 1422, 1427 (8th Cir. 1991) (finding surreptitious videotaping of private dressing room actionable even without proof that plaintiffs were actually viewed in a state of undress); *Phillips*, 435 So. 2d at 709 (finding information about plaintiff's private activities need not actually be acquired before cause of action for invasion of privacy is established); Harkey v. Abate, 346 N.W.2d 74, 76 (Mich. Ct. App. 1983) (finding installation of hidden viewing device in women's restroom constitutes highly offensive interference with privacy, regardless of whether plaintiffs can prove they were actually viewed in restroom); Hamberger v. Eastman, 206 A.2d 239, 242 (N.H. 1964) (upholding cause of action for invasion of privacy for bugging marital bedroom, even in absence of allegations that anyone actually listened or overheard anything).

for any mental distress or special damages.[116] This provision for relief independent of any consequential harm can be understood as redressing "dignitary harm," in the same way that general damages are available for defamation regardless of whether there is proof of actual injury.[117] An invasion of privacy, then, is intrinsically harmful because it entails the denial of basic forms of respect accorded members of the community.[118]

This understanding of the common law tort rests on a conception of privacy that is both highly normative and unavoidably contextual. Rather than neutrally describing an observable state of affairs, privacy is concerned with the meaning of human interactions. Characterizing those interactions—as reasonable and appropriate or unjustified and invasive—is impossible without reference to community norms and expectations. Again, this contextual aspect of privacy norms is reflected in the structure of the common law privacy tort, which only protects matters which are "*entitled* to be . . . private."[119] Thus, individuals observed or photographed while on a public street or outside their homes have no claim for invasion of privacy.[120] Nor can they complain when someone examines information about them contained in public records.[121] The objective fact of observation or information gathering alone is not tortious. Rather, an interest in privacy is legally protectible only where an "actual expectation of seclusion or solitude" exists and "that expectation [is] objectively reasonable."[122] Like the Fourth Amendment inquiry into whether an individual has a reasonable expectation of privacy,[123] the common law tort looks to societal understandings and community norms to determine the legitimacy of an individual's claim to privacy.

Because the significance of an alleged intrusion can only be determined in reference to the norms of a particular community, concepts of privacy are necessarily culturally contingent.[124] Areas felt to be intrinsically private are

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[116] RESTATEMENT (SECOND) OF TORTS § 652H (1977).

[117] *See* KEETON ET AL., *supra* note 53, § 116A, at 843.

[118] *See* Post, *supra* note 94, at 964.

[119] KEETON ET AL., *supra* note 53, § 117, at 855.

[120] *See* Johnson v. Corporate Special Servs., Inc., 602 So. 2d 385, 388 (Ala. 1992); Nader v. General Motors Corp., 255 N.E.2d 765, 771 (N.Y. 1970); McLain v. Boise Cascade Corp., 533 P.2d 343, 346 (Or. 1975).

[121] *See* RESTATEMENT (SECOND) OF TORTS § 652B cmt. c (1977).

[122] People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd., 895 P.2d 1269, 1279 (Nev. 1995) (citing M & R Investment Co. v. Mandarino, 748 P.2d 488, 493 (1987)).

[123] *See* Terry v. Ohio, 392 U.S. 1 (1968).

[124] Given the culturally contingent nature of privacy norms, it should not be surprising that their precise scope is not easily defined. Because privacy norms do not exist in any fixed, objective sense, but only as a matter of evolving social beliefs and practices, their

merely matters of convention when examined from a cross-cultural perspective. For example, Western cultural attitudes toward human nakedness differ markedly from those of many aboriginal cultures and have shifted considerably over time. Nevertheless, a concern with bodily privacy cannot therefore be dismissed as trivial. Because each individual is situated in a particular society, her standing in that community is delineated by *its* cultural norms.[125] Violation of those norms, though perhaps inflicting only a symbolic harm, will nevertheless be experienced as profoundly demeaning and degrading.[126]

The recognition that privacy norms are contextually determined introduces a further complication. Because privacy is concerned with the "characterization of human action," it is not only culturally contingent, but relationally contingent as well, for the meaning of an apparent encroachment on the "territories of the self" turns on the social relationship between the parties. The same act which is perfectly appropriate in one context, may constitute a serious territorial offense if the relationship of the parties is different. As Goffman writes,

> [T]he very forms of behavior employed to celebrate and affirm relationships—rituals such as greetings, enquiries after health, and love-making—are very close in character to what would be a violation of preserves if performed between wrongly related individuals.[127]

This observation should not be surprising, for the very existence of social bonds between individuals entails the removal or lowering of the barriers that

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content is not easily reduced to abstract principle. Disagreements about the definition of privacy are, in a sense, struggles over what the content of those norms should be.

[125] In order to evaluate a claim of invasion of privacy, then, it is first necessary to determine *which* is the relevant community whose cultural norms should be applied. Although in many contexts such an inquiry will be relatively straightforward, cultural norms regarding certain aspects of privacy may vary widely even within a particular society. The existence of distinct cultural subgroups defined along ethnic, religious, socio-economic, or generational lines will invariably result in divergent norms. In a culturally diverse society such as the United States, there is always the danger that "the civility rules enforced by a particular court may be understood as hegemonically imposed by one dominant culture group onto others." Post, *supra* note 94, at 977.

[126] The symbolic aspect of privacy norms does not diminish their importance. Rather, areas designated as private are "highly significant as expressions of respect for others." Fried, *supra* note 64, at 489. This significance is most apparent when these norms are violated: "Not only does a person feel his standing is gravely compromised by such symbolic violations, but also those who wish to degrade and humiliate others often choose just such symbolic aggressions and invasions on the assumed though conventional area of privacy." *Id.*

[127] GOFFMAN, *supra* note 101, at 57–58.

ordinarily separate people.

The territories of the self thus have a dual significance: by asserting these boundaries, the individual demands recognition by the general community; by relinquishing those claims, she permits and expresses the existence of close social bonds with certain others. Personal boundaries can only function in this dual way, however, if the individual retains control over access to the relevant territories. It is in this sense that the "preserves of the self" are linked to "selfhood." The critical issue is not so much whether an individual's territorial boundaries are breached, but whether the individual is granted a sufficiently autonomous role in permitting or denying access to her territorial preserves.[128] A legal right of privacy, by enforcing the individual's exclusive claim to territories of the self, is thus a means of guaranteeing to the individual the self-determination which permits her simultaneously to achieve connection with others and demand respect from her community. Such an understanding is implicit in Fried's argument that privacy, which he defines as control over knowledge about oneself, is the necessary context for relationships of love, friendship, and trust. By granting title to information about oneself, "privacy creates the moral capital which we spend in friendship and love."[129]

From this perspective, many of the debates over what should properly be considered private can be understood as struggles over the appropriate boundaries of the territories of the self. In arguing that information about our spending habits, or our medical histories, or our electronic communications ought or ought not be considered private, we are essentially arguing about the closeness of the link between these aspects of individual life and the self. These debates are particularly difficult because they involve choices between contested cultural meanings. From a sociological perspective, however, the outcome of these struggles—where the precise boundaries are ultimately determined to be—is less important than the fact that *some* such boundaries are recognized. Put another way, the significance of the territories of the self lies in the necessary space they provide for individual flourishing: it is only by recognizing and

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[128] As Goffman writes,

> [T]he issue is not whether a preserve is exclusively maintained, or shared, or given up entirely, but rather the role the individual is allowed in determining what happens to his claim. . . . Thus, on the issue of will and self-determination turns the whole possibility of using territories of the self in a dual way, with comings-into-touch avoided as a means of maintaining respect and engaged in as a means of establishing regard.

Id. at 60–61. Alan Westin and others similarly emphasize the centrality of individual control in any conception of privacy. *See supra* note 78.

[129] Fried, *supra* note 64, at 484.

protecting such a space that the individual is empowered both to assert her standing as an individual within her community, as well as to form and maintain close bonds with others.

This dual function of territorial preserves has some important implications for understanding privacy violations. Generally, an intrusion is understood to occur when someone intrudes on an area *"to which he has no right of access."*[130] As against the stranger, the individual has the broadest possible claims; the stranger has no right to enter any of the areas traditionally designated as private in that society. However, because every social bond involves some waiver of territorial claims, the relevant boundaries change as the relationship between the parties changes. Once a social relationship is entered into, one party may have legitimate right of access to aspects of another's life which would otherwise be shielded by privacy. The individual's waiver of territorial claims, however, is not unlimited; it extends only to those areas which must be shared to accomplish the purposes of the relationship.[131] Those needs, carving out areas of legitimate access from background social norms regarding personal privacy, establish the relevant boundaries for that particular relationship. A violation of privacy, then, occurs when an actor intrudes on an area beyond what is warranted by the existing social relationship between the parties.

In addition to an intrusion, a violation of privacy involves an element of loss of control over access to one's territorial preserves. The degree of this loss of control affects the significance of a given intrusion. For example, the passerby who lingers by a bedroom window in order to overhear private conversations can be easily shut out by closing the window, while the surreptitious use of a listening device to acquire the same information warrants legal action.[132] The worst violations occur when the individual is systematically deprived of control over her territorial preserves through the exercise of power by another.[133] Power may be used to intrude directly, or to force another to

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[130] GOFFMAN, *supra* note 101, at 50 (emphasis added).

[131] Not all relationships are necessarily sought in order to achieve ends outside the relationship itself. Complete friendship, in the Aristotelian sense, values another for the friend's own self, apart from any utility or pleasure that may be derived from the relationship. ARISTOTLE, NICOMACHEAN ETHICS, 211–13 (Terence Irwin trans., 1985). Friendship of this sort likely entails a more complete waiver of one's territorial claims than is required to enter into other, more utilitarian relationships. Nevertheless, the crucial aspect remains the role of individual will in that waiver; true friendship can never be coerced.

[132] *See* Hamberger v. Eastman, 206 A.2d 239, 242 (N.H. 1964).

[133] Traditionally, the primary concern has been with the threat to individual privacy and security posed by expansive state power. Such concerns are reflected in the First, Third, Fourth, and Fifth Amendments to the Constitution. More recently, however,

expose aspects of herself to others. In extreme cases, it may be the individual's own actions which constitute the territorial breach, and yet she is understood not to be the source of the violation herself.[134] An example is the prisoner who is forced to undress in order to undergo a strip search.[135] Although the individual's own acts breach the territorial boundaries, the source of the breach is understood to be located elsewhere; through the exercise of power by another, the individual, in a sense, has become the agent of her own violation.

IV. PRIVACY IN EMPLOYMENT

Given that privacy norms are both culturally and relationally contingent, the legitimacy of employee claims to privacy must be determined by reference to both general social understandings regarding personal privacy as well as the nature and purposes of the employment relationship. When the parties enter into an employment relationship, they do so against an extensive backdrop of informal social norms, including those which regulate personal boundaries. Although those background social norms are undoubtedly affected by the existence of the employment relationship, I argue here that employees nevertheless retain certain legitimate expectations of privacy even in the workplace context.

Outside the employment relationship, the individual ordinarily has a claim to certain socially defined territorial preserves. She is entitled to expect that others will observe and respect the boundaries of the territories of the self. Enforcement of these boundaries is primarily accomplished by an extensive system of informal sanctions, but they are backed by legal authority as well in cases of egregious violation. Thus, the common law prohibits "highly offensive" intrusions by third parties on matters an individual is entitled to keep private, and the Constitution provides roughly analogous protection against intrusions by the government. When legal authority is invoked, the issue is often framed in terms of whether the individual had a "reasonable expectation of privacy" in the area or matter intruded upon.[136]

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technological advances potentially place enormous power in the hands of nongovernmental actors to effect similar invasions of individual privacy. *See* sources cited *supra* notes 12–14.

[134] *See* GOFFMAN, *supra* note 101, at 56.

[135] *See id.*

[136] The protections of the Fourth Amendment come into play only where government action threatens an individual's "'reasonable expectations of privacy.'" Terry v. Ohio, 392 U.S. 1, 9 (1968) (quoting Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). Similarly, the common law tort of invasion of privacy requires that the matter intruded upon "be entitled to be . . . private." KEETON ET AL., *supra* note 53, § 117, at 855; *see also*, People for the Ethical Treatment of Animals v. Berosini, 895 P.2d 1269, 1279

Determining when an individual has a reasonable expectation of privacy is a highly complex inquiry. As the Supreme Court has recognized, there is "no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable."[137] Instead, courts must look to a variety of factors, including actual practices and societal understandings.[138] But this inquiry is more complicated than the Court acknowledges, for societal expectations do not exist independently of legal rules. Although the law purports to take its guidance from societal understandings, those understandings are in turn shaped by legal doctrine. Particularly when the social meaning of a given practice is contested, legal recognition or nonrecognition of an expectation of privacy will drive social norms in one

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(Nev. 1995) (citing M & R Investment Co. v. Mandarino, 748 P.2d 488, 493 (Nev. 1987)) (noting expectation of seclusion or solitude must be objectively reasonable); K-Mart Corp. v. Trotti, 677 S.W.2d 632, 638 (Tex. Ct. App. 1984) (finding plaintiff "demonstrated a legitimate expectation to a right of privacy" by placing lock on workplace locker).

The Fourth Amendment threshold test has sometimes been treated as a two-pronged inquiry, asking first, whether the individual "exhibited an actual (subjective) expectation of privacy" and second, whether that expectation is "one that society is prepared to recognize as 'reasonable.'" *Katz*, 389 U.S. at 361 (Harlan, J., concurring). The subjective prong has been much criticized. Commentators have argued that a purely subjective test of an individual's expectations of privacy is "nonsensical," Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 250 (1993), and that it "has no place . . . in a theory of what the fourth amendment protects." Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 384 (1974). Although the Supreme Court has apparently recognized some of the problems with using a subjective test, *see, e.g.*, Smith v. Maryland, 442 U.S. 735, 740–41 n.5 (1979), it has never explicitly repudiated it, and its role in determining the outcome in Fourth Amendment cases is somewhat unclear. *See* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 2.1(c) (2d ed. 1987).

The requirement under the common law tort of invasion of privacy that the matter intruded upon *actually be private* is not an exact parallel of the subjective prong of the Fourth Amendment test. Rather than looking at subjective understandings, the common law simply requires that "the plaintiff in an invasion of privacy case must have conducted himself or herself in a manner consistent with an actual expectation of privacy, i.e., he or she must not have manifested by his or her conduct a voluntary consent to the invasive actions of defendant." Hill v. NCAA, 865 P.2d 633, 648 (Cal. 1994).

[137] O'Connor v. Ortega, 480 U.S. 709, 715 (1987) (plurality opinion).

[138] In determining what expectations of privacy are reasonable, "'the Court has given weight to such factors as the intention of the Framers of the Fourth Amendment, the uses to which the individual has put a location, and our societal understanding that certain areas deserve the most scrupulous protection from government invasion.'" *Id.* (quoting Oliver v. United States, 466 U.S. 170, 178 (1984)).

direction or another.[139] A full exploration of the interaction between legal rules and social norms, and the proper role of law in shaping privacy expectations is beyond the scope of this Article. While I believe that current doctrine is likely to be insufficiently protective of important privacy interests, I make a more limited claim here: whatever the exact contours of privacy expectations are or should be in general, those expectations are not wholly negated by the existence of the employment relationship.

Outside the employment context it is possible to identify certain *core* areas of privacy which are recognized in this society. Although the proper scope of privacy protection is controversial in many areas, certain aspects of individual life are consistently acknowledged to be private in a broad variety of contexts. For example, both the common law and constitutional cases acknowledge that strong interests in privacy shield the individual's body and bodily functions from examination absent some justifying circumstance.[140] Certain types of personal information relating to health and sexual matters have also frequently

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[139] For example, the issue of whether communications sent by electronic mail should be regarded as private is today unsettled and highly controversial. *See* United States v. Maxwell, 42 M.J. 568, 576 (A.F.C.C.A. 1995) (finding an expectation of privacy in electronic communications only as long as the communications are stored in the computer, but not if downloaded or removed from the on-line service); S. REP. NO. 99-541, at 4 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3558 (Department of Justice letter to Senator Leahy stating that when a reasonable expectation of privacy exists in electronic communications is "not always clear or obvious."). In addressing legal disputes regarding the privacy of electronic mail, courts may attempt to reflect nascent understandings of this new technology, but their rulings will themselves become a dominant factor in shaping privacy expectations in the future. In determining that electronic mail communications are or are not private, courts will not so much be making a factual assessment of its nature—no consensus currently exists—but a normative choice as to whether these communications should be protected as private.

A similar dynamic occurs between "actual practices" and "societal understandings." On the one hand, widely accepted privacy norms will shape actual practices, because individuals within the community will feel constrained to conform their behavior to those norms. On the other hand, even strongly held norms may be eroded over time as limited incursions are first tolerated and then accepted.

[140] *See, e.g.*, Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 616–17 (1989) (finding compelled blood tests implicate Fourth Amendment privacy interests in security of one's person; monitoring of act of urination also infringes privacy interests long recognized by society); Schmerber v. California, 384 U.S. 757, 769–70 (1966) (finding Fourth Amendment protection of human dignity and privacy forbids unreasonable searches involving intrusions beyond the body's surface); Doe by Doe v. B.P.S. Guard Servs., Inc., 945 F.2d 1422, 1427 (8th Cir. 1991) (videotaping of models in dressing room constitutes tortious invasion of privacy); Harkey v. Abate, 346 N.W.2d 74, 76 (Mich. Ct. App. 1983) (installating of viewing device in women's restroom constitutes tortious invasion of privacy).

been recognized as private.[141] And both private individuals and government agents are prohibited from intruding without justification upon the individual's home, or upon communications traditionally respected as private—such as the telephone or mails.[142] Personal privacy in these core areas is fundamental, not necessarily because of their intrinsic value, but because they have been designated in *this* society as somehow central to the self.[143] Gratuitous intrusions on these core areas of privacy threaten not only dignitary harm, but the individual's standing in the community as well.[144]

At least in these core areas, individuals are clearly acknowledged to have

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[141] *See, e.g., Skinner*, 489 U.S. at 616–17 (finding blood and urine tests implicate Fourth Amendment because analysis of bodily fluids can reveal "a host of private medical facts about an employee"); Whalen v. Roe, 429 U.S. 589, 599–600 (1977) (finding state collection of medical records threatens constitutionally protected interest in nondisclosure of private information); Glover v. Eastern Nebraska Community Office of Retardation, 867 F.2d 461, 464 (8th Cir. 1989) (finding mandatory blood tests of employees for AIDS virus violates Fourth Amendment); *In re* Search Warrant (Sealed), 810 F.2d 67, 71 (3d Cir. 1987) (finding medical records are clearly within constitutionally protected sphere); Thorne v. City of El Segundo, 726 F.2d 459, 470 (9th Cir. 1983) (questioning of applicant for police officer position about her past sex life violated her constitutional privacy interests).

Allegations by a plaintiff that her employer made repeated inquiries into her sex life have also been held to state a cause of action for tortious intrusion on seclusion. *See* Phillips v. Smalley Maintenance Servs., Inc., 435 So. 2d 705, 711 (Ala. 1983). Although there do not appear to be any common law "intrusion on seclusion" cases dealing with unauthorized access to medical records, personal information contained in medical records is clearly "private" information protected from public disclosure by the common law tort. *See* FINKIN, *supra* note 16, at 16–18 and cases cited therein.

[142] Invasions of an individual's home, telephone conversations, and personal mail by nongovernmental actors have been found to give rise to a claim for tortious invasion of privacy. *See, e.g.*, Vernars v. Young, 539 F.2d 966, 969 (3d Cir. 1976) (mail); LeCrone v. Ohio Bell Tel. Co., 201 N.E.2d 533, 540 (Ohio Ct. App. 1963) (telephone conversations); Gonzales v. Southwestern Bell Tel. Co., 555 S.W.2d 219, 222 (Tex. Ct. App. 1977) (home). Similarly, the Constitution clearly forbids unreasonable intrusions on the home and private communications. *See* U.S. CONST. amend. IV; Katz v. United States, 389 U.S. 347, 353 (1967) (telephone conversation); *Ex parte* Jackson, 96 U.S. 727, 733 (1877) (mail). Of course, other laws also protect against these types of intrusions in certain circumstances. *See e.g.*, Title III Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–2520 (1994).

[143] "Convention . . . designates certain areas, intrinsically no more private than other areas, as symbolic of the whole institution of privacy, and thus deserving of protection beyond their particular importance." Fried, *supra* note 64, at 487. Fried identifies excretory functions and matters of sex and health as examples of conventionally designated areas of privacy carrying significant symbolic importance in our culture. *See id.* at 487–88.

[144] *See supra* notes 94–108 and accompanying text.

rights of privacy against the government and against third parties. How the individual's expectations of privacy in these core areas are affected when an intrusion by an employer is threatened depends upon the nature of the employment relationship. Employment falls at some mid-point on the spectrum of social relationships. It is characterized neither by the distant formality of a chance encounter with a stranger, nor by the intimacy found between close friends or lovers. Employment involves an economic exchange—the employee trades her labor for wages—but it is also typically an ongoing relationship with a social as well as an economic dimension.[145] Employer and employee generally understand themselves to be engaged in a joint effort to achieve some common end. To that extent, employees must relinquish certain claims they otherwise might assert against the world at large. A prospective employee is routinely expected to reveal to the employer basic personal data, as well as information about her education, experience, and skills that relate to her fitness to perform a particular job. Once hired, she understands that her work will be supervised and reviewed to ensure that she is performing adequately. Thus, an employee must inevitably compromise her broadest territorial claims to achieve the purposes of the relationship.

On the other hand, employment is not an all-encompassing relationship. Although some territorial boundaries are necessarily breached to make employment possible, this implicit waiver of territorial claims does not automatically extend to those areas recognized to be at the core of personal privacy. Because employer and employee enter into the relationship for a specific, limited purpose, any implied waiver only extends as far as necessary to achieve that purpose. To conclude otherwise would set the employment relationship apart among social relationships, for the individual who could expect—and enforce—limits on unjustified intrusions by the government or third parties on core areas of privacy would have no such expectation vis-a-vis her employer. Given that the interests at stake are the same regardless of the source of the intrusion, it would be anomalous to treat the employer's actions as uniquely privileged. When core areas of privacy—those central to the self—are threatened, employer intrusions should not be permitted unless essential to meet some business need.

The conclusion that employees do not lose all ordinary expectations of privacy merely because they enter into an employment relationship has been

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[145] This observation is not true of all employment relationships, of course. The employment experiences of day laborers, for example, usually involve casual, one-time market exchanges with little or no expectation of an ongoing relationship with an employer. Similarly, the growth of the temporary personnel industry has significantly altered the nature and expectations of the employment relationship for a substantial segment of the work force.

confirmed in a number of legal contexts. Arbitrators interpreting collective bargaining agreements have held that "an employee does not somehow abandon his right to privacy at the doorstep of the employer's premises."[146] Merely by signing on to an employment relationship, an individual does not automatically open his private life to the scrutiny of the employer.[147] Similarly, courts applying the common law right of privacy to the workplace have concluded that employees retain some legitimate expectations of privacy despite the existence of an employee-employer relationship.[148]

Further evidence that employees retain at least some socially recognized interests in privacy can be found in cases involving public employees. Although those cases are generally decided on constitutional grounds inapplicable in the private sector, they nevertheless reveal societal understandings of the nature of the employment relationship. Doctrinal categories aside, cases dealing with the privacy rights of public employees are concerned not so much with limits on government when acting in its sovereign capacity, as with the employee's reasonable expectations of privacy when the government happens to be the employer. Despite the existence of the employment relationship, courts have recognized that the "individual interest in avoiding disclosure of personal matters"[149] limits government inquiries into its employees' prior sexual activities and associations, past drug and alcohol use, mental health history, and personal financial information.[150]

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[146] Trailways, Inc., 88 Lab. Arb. (BNA) 1073, 1080 (1987) (Goodman, Arb.).

[147] *See id.*

[148] *See, e.g.*, Borse v. Piece Goods Shop, Inc., 963 F.2d 611, 626 (3d Cir. 1992); Kelley v. Schlumberger Tech. Corp., 849 F.2d 41, 42 (1st Cir. 1988); O'Brien v. Papa Gino's of America, Inc., 780 F.2d 1067, 1072 (1st Cir. 1986); Garus v. Rose Acre Farms, 839 F. Supp. 563, 570 (N.D. Ind. 1993); Phillips v. Smalley Maintenance Servs., Inc., 435 So. 2d 705, 711 (Ala. 1983); Sowards v. Norbar, Inc., 605 N.E.2d 468, 474–75 (Ohio Ct. App. 1992); Leggett v. First Interstate Bank of Oregon, 739 P.2d 1083, 1086–87 (Or. Ct. App. 1987); Kjerstad v. Ravellette Publications, Inc., 517 N.W.2d 419, 424 (S.D. 1994); K-Mart Corp. v. Trotti, 677 S.W.2d 632, 637 (Tex. Ct. App. 1984); Cordle v. General Hugh Mercer Corp., 325 S.E.2d 111, 117 (W. Va. 1984); *cf.* Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123, 1130 (Alaska 1989) (finding public policy supporting protection of employee privacy); Luck v. Southern Pac. Transp. Co., 267 Cal. Rptr. 618, 628 (Cal. Ct. App. 1990) (finding California constitutional right of privacy applies in private sector workplace); Semore v. Pool, 266 Cal. Rptr. 280, 283 (Cal. Ct. App. 1990) (same); Bratt v. IBM, 467 N.E.2d 126, 134 (Mass. 1984) (finding Massachusetts right of privacy statute applies in employment context).

[149] Whalen v. Roe, 429 U.S. 589, 599 (1977).

[150] *See, e.g.*, Thorne v. City of El Segundo, 726 F.2d 459, 468 (9th Cir. 1983) (past sexual history); American Fed'n of Gov't Employees v. United States R.R. Retirement Bd., 742 F. Supp. 450, 455 (N.D. Ill. 1990) (alcohol and drug use); *cf.* Fraternal Order of Police

Cases decided under the Fourth Amendment have explicitly found that public employees have expectations of privacy "that society is prepared to recognize as 'reasonable.'"[151] For example, in *O'Connor v. Ortega*,[152] the U.S. Supreme Court considered a challenge by Dr. Ortega, a state hospital employee, to a search of his office, desk, and file cabinets conducted by his employer. Noting that the "operational realities" of the workplace might make some employee's expectations of privacy unreasonable when the intrusion was by a supervisor rather than law enforcement, the Court nevertheless rejected the Government's argument that its employees could never have a reasonable expectation of privacy at work.[153] Looking instead to "the societal expectations of privacy in one's place of work"[154] and the actual practices at the hospital,[155] the Court concluded that Ortega had a reasonable expectation of privacy in his desk and file cabinets and possibly his office as well.[156]

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v. Philadelphia, 812 F.2d 105, 109 (3d Cir. 1987) (physical and mental condition; financial information; gambling habits and alcohol use); National Treasury Employees Union v. IRS, 843 F. Supp. 214, 218 (W.D. Tex. 1992) (illegal drug use during past five years), *vacated*, 25 F.3d 237 (1994).

[151] Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

[152] 480 U.S. 709 (1987).

[153] *Id.* at 717. The Court's analysis focused on Ortega's expectation of privacy in the place of work itself. The Court earlier noted that "[n]ot everything that passes through the confines of the business address can be considered part of the workplace context." *Id.* at 716. Where the need for access by supervisors or coworkers does not exist, for example, to the contents of an employee's closed luggage, handbag, or briefcase, the Court suggests that a different, and presumably higher, standard would apply. *See id.*

[154] *Id.* at 717. The Court cited its earlier decisions in *Oliver v. United States*, 466 U.S. 170 (1984), and *Mancusi v. DeForte*, 392 U.S. 364 (1968), as recognizing societal expectations of privacy in one's place of work. *See* O'Connor v. Ortega, 480 U.S. 709, 717 (1987).

[155] Ortega had occupied the office for 17 years and kept numerous personal materials there. It was undisputed that he had exclusive use of his desk and file cabinets and that the hospital had never discouraged him from storing personal items at work. *See O'Connor*, 480 U.S. at 718–19.

[156] All members of the Court agreed that Ortega had a reasonable expectation of privacy in his desk and file cabinets. *See id.* at 718 (plurality opinion); *see id.* at 731 (Scalia, J., concurring); *see id.* at 732 (Blackmun, J., dissenting). Five of the Justices also found that Ortega had a reasonable expectation of privacy in his office. *See id.* at 731 (Scalia, J., concurring); *see id.* at 732, 737–41 (Blackmun, J., dissenting). The plurality, however, would remand the question of Ortega's expectations of privacy in his office because the factual record did not reveal the extent to which hospital officials may have entered the office for work-related reasons. *See id.* at 718.

Because Ortega had a reasonable expectation of privacy at least in his desk and file cabinets, the Court went on to address the appropriate Fourth Amendment standard to be

In *Skinner v. Railway Labor Executives' Ass'n*,[157] the Court again considered the constitutionality of employer searches under the Fourth Amendment. Despite its ultimate conclusion that the Government's compelling interest in railroad safety was decisive, the *Skinner* Court did recognize that the mandatory blood and urine tests at issue implicated significant privacy interests of the affected employees, based on its prior decisions regarding blood tests in the criminal context, the sensitive nature of the information revealed through testing, and traditional mores surrounding excretory functions.[158]

If employees in fact retain some socially recognized expectations of privacy vis-a-vis their employers, then some method for determining which claims to privacy are legitimate is needed. As a first step, courts should look to general societal understandings to determine what aspects of individual life are shielded by privacy. Evidence of the relevant social norms may be found not only in actual practices and societal understandings, but also in privacy cases decided outside the employment context. Common law cases finding a tortious invasion of privacy can be examined to identify matters "entitled to be private." Similarly, cases decided under state constitutions or the U.S. Constitution provide further evidence of established privacy norms by identifying the core

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applied to searches in the workplace. Noting that an employer might frequently need to enter and search an employee's office for legitimate work-related purposes, the Court concluded that adherence to the requirements of a warrant and probable cause in the employment setting was impracticable. Rather, when "noninvestigatory, work-related" searches or "investigations of work-related misconduct" infringe on protected privacy interests, the intrusion "should be judged by the standard of reasonableness under all the circumstances." *Id.* at 725–26.

[157] 489 U.S. 602 (1989).

[158] *See id.* at 616–17. Concerning the blood tests, the Court wrote:

> In light of our society's concern for the security of one's person, it is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable. The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee's privacy interests.

Id. at 616 (citations omitted). As to the urine tests, the court wrote:

> [C]hemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic. Nor can it be disputed that the process of collecting the sample to be tested, which may in some cases involve visual or aural monitoring of the act of urination, itself implicates privacy interests.

Id. at 617.

areas in which individual expectations of privacy are recognized as reasonable.

By looking to constitutional privacy cases, I am not suggesting that the Constitution does or should apply directly to private employers. My proposal is a more modest one: that cases decided on constitutional grounds be looked to as one source of evidence of basic social expectations regarding privacy. Joseph Grodin and Clyde Summers each have argued that constitutional *values* should be brought to bear in the private sector workplace, not so much through the direct application of constitutional provisions, but by legislative and common law developments that are sensitive to and protective of basic personal freedoms such as the right of privacy.[159] Similarly, I argue that constitutional cases can and should provide experience in identifying those matters socially recognized to be private when determining the legitimacy of employee claims to privacy under the common law.

Because privacy norms are relationally contingent, identifying general societal expectations of privacy are only the first step in assessing the legitimacy of employee claims to privacy. These ordinary expectations must then be reassessed and revised in light of the nature and purposes of the employment relationship. Although, as discussed above, an individual's expectations of privacy are not negated simply by the fact of employment, they may be diminished to some extent in light of the specific employer's legitimate business needs. Certain business needs requiring minor incursions on individual privacy are commonplace and generally uncontroversial. For example, employers generally have a legitimate need to inquire into a worker's educational background, past work experience, and skills. But the more closely an employer's inquiries or practices trench on interests at the recognized core of individual privacy, the greater the need for some specific justification. Generalized assertions of business need should not be sufficient to trump entirely an employee's socially recognized expectations of privacy. As discussed above, the waiver of territorial claims required to form the employment relationship is not an unbounded one; it extends only so far as necessary to achieve the purposes of that relationship. Each employer intrusion must be justified, not only in its purpose, but in the extent of its intrusiveness as well.[160] Thus, even a legitimate employer interest, such as securing its

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[159] Joseph R. Grodin, *Constitutional Values in the Private Sector Workplace*, 13 INDUS. REL. L.J. 1 (1991); Clyde W. Summers, *The Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons from Labor Law*, 1986 U. ILL. L. REV. 689 (1986).

[160] As the Supreme Court put it in *O'Connor*, the reasonableness of an intrusion on employee privacy depends upon both its inception and scope. *See* 480 U.S. at 726. Even if a search is justified at its *inception* by strong work-related reasons, it will be permissible in *scope* only when "'the measures adopted are reasonably related to the objectives of the

property, cannot, without more, justify radically invasive measures such as continual video surveillance of employees in traditionally private places like restrooms or the interception of purely private phone calls.[161]

Of course, the employer's interests vary from workplace to workplace. One implication of recognizing that privacy norms are relationally contingent is that the relevant norms depend not only upon the fact of the employment relationship, but the type of employment relationship as well. The overall purpose of the business of the employer and the nature of the employee's specific job are relevant considerations in determining which intrusions violate socially sanctioned claims of privacy. Thus, a health club which employs fitness trainers has a legitimate interest in the health status and physical conditioning of its employees to an extent that the employer of clerical workers does not. In the first case, their physical condition goes to the core of the purpose for which the employees were hired; in the second case, it is at best peripheral. Difficult questions may arise as to the true nature and purpose of the employment in a given situation and will require a highly fact-specific inquiry for resolution.

At this point, however, a caveat is necessary. Although privacy norms vary depending upon context, that variation arises from broad-based social understandings of the differing nature of the different relationships, *not* from the unilateral actions of one party to the relationship. The parties can, of course, create by agreement a higher expectation of privacy than that established by general background norms. Thus, for example, an employer may bind itself through an express contract not to inquire into certain aspects of an employee's life.[162] In the next section, I address the more difficult question of whether the parties to an employment relationship can mutually agree that

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search and not excessively intrusive in light of . . . the nature of the [alleged misconduct].'" *Id.* (quoting New Jersey v. T.L.O., 469 U.S. 325, 342 (1985)). Occasionally, courts seem to collapse these two considerations and assume that so long as the purpose of the intrusion is somehow work-related, the employer may use "intrusive and even objectionable means" to achieve its goals. *See, e.g.*, Baggs v. Eagle-Picher Indus., 957 F.2d 268, 275 (6th Cir. 1992). The net effect of such an approach is to eviscerate any employee claim to privacy, because an employer will always be able to articulate some broad interest that might be served by invading its employees' privacy.

[161] Such an approach is consistent with common law privacy cases decided in nonemployment contexts where the mere fact of property ownership is not sufficient to justify otherwise unreasonable intrusions on privacy. *See, e.g.*, Harkey v. Abate, 346 N.W.2d 74, 76 (Mich. Ct. App. 1983) (installing viewing device in women's restroom by owner of skating rink actionable); Hamberger v. Eastman, 206 A.2d 239, 242 (N.H. 1964) (installing listening device in tenants' bedroom by owner of property gives rise to a claim for tortious invasion of privacy).

[162] *See* Rulon-Miller v. IBM, 208 Cal. Rptr. 524, 530 (Cal. Ct. App. 1984).

the employee will waive her socially established expectations at the core of personal privacy. Putting aside for the moment the issue of voluntary waiver, my point here is that the employer cannot defeat these socially recognized expectations of privacy simply by adopting practices violative of fundamental privacy norms.[163]

This point was articulated by California Supreme Court Justice Kennard in her partial concurrence in *Hill v. NCAA*, a case interpreting California's constitutional right of privacy as applied to private actors:

> No association, industry, or other group or entity may establish the parameters of the reasonable expectation of privacy at the expense of society. For instance, an employer may not, simply by announcing in advance that all employees will be subject to periodic strip searches, thereby defeat the employees' otherwise reasonable expectation that such searches will not occur. *Governing social*

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[163] The Supreme Court's opinion in the *Skinner* case appears somewhat ambiguous on this point. In concluding that the government's interest in safety outweighed employee expectations of privacy, the Court noted that railroad employees have diminished expectations of privacy because "of their participation in an industry that is regulated pervasively to ensure safety." Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 627 (1989). Because such employees are already subject to periodic physical exams and other tests of their physical condition, the Court concluded that the drug testing at issue "pose[d] only limited threats to the justifiable expectations of privacy of covered employees." *Id.* at 628.

The Court's conclusion could be interpreted as based solely on the railroad employees' subjectively reduced expectations of privacy in light of their past experiences. A more reasonable interpretation, however, is that the finding of diminished expectations of privacy is justified because of the strength of the government's interests in safety which underlie the existing regulation, not the mere fact of regulation itself. Otherwise, the government could invade even those areas traditionally shielded by great privacy simply by establishing workplace regulations and practices intrusive of privacy. Through incremental incursions on traditionally private areas, the public employer could ultimately render any employee expectations of privacy "unreasonable." The point has been made before more generally by those critical of the subjective prong of the reasonable expectations test. *See, e.g.*, Amsterdam, *supra* note 136, at 384 (Under a purely subjective test, "the government could diminish each person's subjective expectation of privacy merely by announcing half-hourly on television . . . that we were all forthwith being placed under comprehensive electronic surveillance."). To avoid rendering Fourth Amendment protections virtually meaningless for government employees, the legitimacy of employee expectations of privacy must be based on "'our societal understanding that certain areas deserve the most scrupulous protection from government invasion[,]'" *O'Connor*, 480 U.S. at 715 (quoting Oliver v. United States, 466 U.S. 170, 178 (1984)), rather than on the employees' subjective expectations established solely through past employer practices.

norms, not the specific practices of an individual defendant or industry, define whether a plaintiff has a reasonable expectation of privacy.[164]

Thus, although unjustifiably intrusive employer practices might affect the actual experiences of employees in that particular workplace, the mere fact that such practices have been adopted cannot be determinative of what those employees are reasonably entitled to expect, or what expectations of privacy *society* is prepared to recognize as reasonable.

Employee claims to privacy, then, are not defined or limited by idiosyncratic practices in the particular workplace. Rather, the legitimacy of employee expectations of privacy depends upon broadly recognized social norms regarding privacy. These norms help define the community and its delineation of the individual's place in it, and therefore, the society as a whole has an interest in their maintenance. And because the harm threatened by unjustified violations of these norms is the same whether they result from the actions of one's employer or some other third party, the protection offered by the common law tort of invasion of privacy to redress egregious violations ought to be available in the employment context as well.

V. THE LIMITS OF THE MARKET ARGUMENT

Providing legal protection of employee privacy is, of course, complicated by the contractual nature of the employment relationship. To the extent that the common law tort of invasion of privacy is applied to provide some minimum guarantee of employee privacy, it will undoubtedly be criticized as an unwarranted interference with the "free market." In a sense, there is no such thing as a truly "unregulated market": every market is based on legal rules—rules that establish the parties' starting positions and the bargaining ground rules.[165] The question, therefore, is never *whether* legal rules should structure the bargaining process—they inevitably do so—but *how* they should do so—an inquiry that can only be answered by comparing the substantive outcomes that result under alternative regimes.[166] Nevertheless, the argument is frequently made that rules addressing the substantive terms of an employment agreement are presumptively invalid. To meet this argument, any proposal for imposing even minimal protections for employee privacy rights must address two distinct

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[164] Hill v. NCAA, 865 P.2d 633, 671 (Cal. 1994) (Kennard, J., concurring and dissenting) (emphasis added).

[165] Karl E. Klare makes this argument forcefully in the labor context in his article, *Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1, 17–18 (1988).

[166] *See id.* at 17.

but related claims. First, a laissez-faire approach is said to be superior to alternative methods of structuring the employment relationship because it is more efficient. Second, defenders of the traditional "unregulated" market contend that it promotes individual autonomy. I examine each of these claims in turn, as they might apply to the issue of employee privacy.

The argument based on efficiency looks to the "natural workings" of the market to protect employee privacy interests. In the world of neoclassical economics, employees seeking to maximize their well-being through a combination of wages and working conditions will demand higher wages from an employer who routinely invades their privacy. Conversely, employers who are respectful of their employees' privacy will be able to pay a lower wage, in effect shifting part of the compensation package from cash wages to more desirable working conditions. To the extent that invading employee privacy contributes to the overall productivity of the firm—by providing useful information, say, or deterring employee wrongdoing—an employer will invade employee privacy up to the point where the marginal utility of the additional gains in information or deterrent effect equals the marginal cost of compensating employees for further reductions in their privacy. This point represents the efficient outcome at which employees have the optimal package of wages and working conditions; no further trades can improve their position.[167] Thus, from the perspective of neoclassical economics, legal protection of employee privacy rights is not only unnecessary, but actually harms workers by prohibiting further trades (higher wages for less privacy) that would increase their overall welfare.

The argument against protecting employee privacy rights based on efficiency concerns is subject to both an internal and an external critique. The internal critique questions the empirical validity of many of the assumptions embedded in this description of the workings of the labor market. The neoclassical market model begins with the assumption that there are numerous rational actors (both employees and employers) bargaining under conditions of perfect competition, full information, and no transaction costs. To the extent that these assumptions do not hold true in the real world, the efficiency of the market outcome is uncertain.

The objections to assuming conditions of perfect competition in the labor market have been widely argued[168] and apply with equal force when

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[167] Of course, the equilibrium point is the efficient outcome only given the parties' initial bargaining endowments and the market processes which structure their trades. Different starting positions or a shift in their respective endowments, including legal endowments, might result in further trades that benefit the worker.

[168] *See, e.g.*, RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 3–25 (1984); PAUL C. WEILER, GOVERNING THE WORKPLACE 73–78 (1990); Cass R. Sunstein,

considering workplace privacy. The existence of information and transaction cost barriers suggests that no real bargaining occurs over workplace conditions affecting employee privacy. Prospective employees generally do not have adequate information for assessing the intrusions entailed by an employer's surveillance or monitoring practices, especially to the extent that those practices are surreptitious. Although unable to observe the relevant conditions directly, prospective employees are unlikely to raise any concerns about privacy during the hiring process out of fear of signaling to the employer that they have something to hide. Employers, who hold all the relevant information, will not voluntarily reveal the presence of job conditions which might lead to demands for higher wages.[169] Even assuming these signaling problems and informational barriers could be overcome, the transaction costs involved in negotiating over the variety of circumstances which might justify any of a number of potential intrusions make true bargaining over the issue not only inefficient, but virtually impossible.[170]

The neoclassical economic account also assumes that the employer is a rational actor and that there are no agency problems. However, to the extent that individual managers act to increase their own felt power, even at the expense of their employer's economic interests, workplace privacy, viewed as an economic "good," will be underproduced. Such danger is especially acute because of the nature of privacy interests. On the one hand, the costs to the

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Rights, Minimal Terms, and Solidarity: A Comment, 51 U. CHI. L. REV. 1041, 1055 (1984); Steven L. Willborn, *Individual Employment Rights and the Standard Economic Objection: Theory and Empiricism*, 67 NEB. L. REV. 101, 128 (1988); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1830–31 (1980).

[169] Employers that respect privacy, however, might have an incentive to reveal the favorable working conditions they offer to attract or retain high quality workers. *See, e.g.*, Rulon-Miller v. IBM, 208 Cal. Rptr. 524, 530 (Cal. Ct. App. 1984). Even employers who do not directly reveal their potentially invasive practices to prospective employees may be concerned about reputational effects. Nevertheless, as discussed in the text, there are serious reasons to doubt that sufficient information about workplace privacy issues is available to the marginal worker (the one currently being recruited) to insure that employee privacy concerns are adequately protected through the ordinary employment contracting process.

[170] As Willborn points out, the problems of imperfect information and transaction costs are compounded when a collective term—that is, an employment condition which is provided to all employees if it is provided to one—is in issue. *See* Willborn, *supra* note 168, at 120–27. Because workers may engage in strategic behavior to position themselves as free riders, a collective good is likely to be underproduced in the sense that the employer may not provide it, even though the cost of providing that good is less than its value to the workers. *See id.* at 121. Certain workplace conditions affecting privacy—for example, surveillance systems—appear to be collective terms susceptible to these difficulties.

employee of losses of privacy will only be imperfectly internalized by the company for the reasons discussed above. On the other hand, because of the highly symbolic function played by privacy norms, their violation offers an especially potent means for the manager to wield power over subordinates.[171] Even if the market is able to correct for such inefficiencies over time, individual employees will suffer uncompensated harms from these invasions in the short run.

The neoclassical market model likely fails to capture the realities of the employment relationship in another critical way. In a perfectly competitive market, employees are assumed to move freely from one job to another in a series of costless (or relatively low-cost) transactions, seeking the best wage and benefit package offered by a number of competing employers. However, a considerable body of recent scholarship has concluded that in fact a significant number of employment relationships are long-term rather than casual, and that firms structure employment in such a way as to encourage employee longevity.[172] Through progressive wage structures, internal promotion ladders, and pensions and other benefits linked to years of service, employees are tied ever more closely to their current jobs, making separation—whether voluntary or not—increasingly costly to the worker. Although in theory free to leave in search of better wages or working conditions, the employee cannot do so without losing a substantial, firm-specific investment in both job skills and seniority-linked benefits.[173] If long-term employees (those most likely to have

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[171] The tendency of a manager to use invasions of privacy to exercise power is exacerbated by the ease with which such invasions may be undertaken. Particularly as advancing technology steadily reduces the expense and effort required to implement monitoring, testing, and surveillance systems, the temptation to use such technology without fully considering its costs to the employee increases.

[172] *See* WEILER, *supra* note 168, at 63–64 and sources cited therein; *see also* Mathew W. Finkin, *The Bureaucratization of Work: Employer Policies and Contract Law*, 1986 WIS. L. REV. 733, 740–43 (1986); 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, 475–79 (1979). The common pattern of long-term employment after an initial period of "job shopping" creates the potential for opportunism on both sides. *See* Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8, 20–28 (1993).

For employees, the phenomenon of "job lock" and the vulnerability it creates may be exacerbated when an employee or her dependent has a pre-existing medical condition which will no longer be covered if the employee loses her current health insurance along with her job. The recently passed Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 stat. 1936 (Aug. 21, 1996) (West, WESTLAW through 1996 legislation), only partially alleviates this latter aspect of the problem.

[173] The frequency of mass layoffs in recent years has sometimes been taken as

knowledge of a firm's practices affecting privacy) cannot easily substitute another job for their current one, the discipline imposed by the market breaks down, and employee privacy will likely be insufficiently protected.

Of course, labor market conditions vary greatly depending upon the industry, skill level of the worker, and geographic location, and not all of the market "imperfections" identified above necessarily affect every type of employment. The important point is this: actual conditions deviate significantly enough and often enough from the assumptions of a perfectly competitive labor market that any reliance on the "unregulated" market to reach an "efficient" level of protection for employee privacy is largely a matter of faith. Those who believe that markets are the appropriate way to allocate all goods in society are unlikely to be troubled by the efficiency concerns raised above. From their perspective, exceptions to a laissez-faire regime are justified only in cases of demonstrated market failure, and a presumptive faith in the workings of the market to achieve substantively just outcomes is appropriate.

But aside from disputes over the actual efficiency of the labor market, the neoclassical economic perspective is subject to an external critique that raises far more fundamental objections. Implicit in traditional defenses of the "unregulated market" is the moral claim that wealth maximization is the appropriate normative principle for ordering social arrangements. This principle of wealth maximization has been widely criticized, and the claim in its strongest form has been virtually abandoned.[174] But even in a weaker form, in which concerns of efficiency are not absolute, but are an important public-policy consideration, the wealth-maximizing principle raises certain difficulties. Its application to concrete problems necessarily requires that all desires, preferences, wants, and values be reduced to a common currency, so that they may be compared and exchanged. Margaret Radin, among others, has condemned this "universal commodification," arguing that it endorses an impoverished view of personhood:

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evidence that the old pattern of lifetime, or at least career, employment no longer holds true. However, even if workers can no longer expect a guarantee of lifetime employment, it does not necessarily follow that jobs have become fungible. The loss of one's own job, especially an involuntary loss after years spent working for one employer, is not easily replaced. Evidence exists that laid off workers continue to experience earnings losses as long as ten years after losing their jobs. *See Fed Economist Says Layoffs Have a Long-Term Impact on Earning Potential*, Daily Lab. Rep. (BNA), May 16, 1996, at A-13.

[174] Richard Posner has acknowledged that not all of the considerable criticisms leveled against his use of wealth maximization as a normative theory can be answered. Nevertheless, he maintains that wealth maximization remains a useful guiding principle in common law adjudication for pragmatic reasons. *See* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 374–87 (1990).

> Universal market rhetoric transforms our world of concrete persons, whose uniqueness and individuality is expressed in specific personal attributes, into a world of disembodied, fungible, attribute-less entities possessing a wealth of alienable, severable "objects." This rhetoric reduces the conception of a person to an abstract, fungible unit with no individuating characteristics.[175]

Radin's critique of a universal market analysis is especially potent when applied to issues of individual privacy. In order to analyze employee claims to privacy in market terms, privacy must be understood as an alienable "good"—something that can be possessed, measured, and exchanged for an equivalent sum of money. It must be an object that exists apart from the individual for which she has a discernible, measurable preference. However, this sort of market rhetoric is particularly at odds with the highly normative conception of privacy embedded in the law. As seen above, the common law tort of invasion of privacy is closely linked to concerns of basic human dignity and personality. Underlying the protections it affords is an implicit understanding that privacy norms play a critical role in constituting identity—by providing a vehicle for both recognition of the individual by others and expression of self through social bonds with others. Moreover, the assumption that individual preferences are exogenously determined is particularly inappropriate when discussing concerns about privacy. Privacy norms are highly contextual, depending not only upon the values of a particular society, but also the nature of the relationship between the parties. Because privacy refers, not to some objectively quantifiable good, but to the characterization of certain human interactions, the neoclassical market model is a particularly inappropriate way to evaluate claims of privacy.

Rejecting universal commodification as fostering an inferior conception of human flourishing, Radin proposes a richer description of personhood, one which conceives of the individual as "integrally connected to the world of things and other people."[176] In rejecting the traditional liberal view of the person as an abstract, isolated subject, Radin introduces the notion of incomplete commodification. Rather than viewing all exchanges in purely market terms, she argues that there is frequently an "irreducibly nonmarket or nonmonetized aspect of human interaction going on."[177] Although "the sale of a commodity" may be one way to describe what occurs between two parties, it does not fully capture the meaning of their interaction. Deviations from a

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[175] Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1885 (1987).

[176] Margaret Jane Radin, *Justice and the Market Domain*, *in* NOMOS XXXI: MARKETS AND JUSTICE 178–79 (John W. Chapman & J. Roland Pennock eds., 1989).

[177] *Id.* at 177.

purely market economy may be understood as a way of preserving and fostering these nonmarket aspects of exchange in order to promote human flourishing, particularly when the goods at issue—housing, health care, or political influence—are closely related to ideals of personhood and community. In this view, regulation need not be justified solely on the grounds of market failure, but may be seen as "a good-faith working out of community values, so that persons and the community may properly flourish."[178]

Once privacy is reconceived, not as an alienable good standing apart from the individual, but as the necessary means by which the individual's standing in the community is both recognized and expressed, the question of regulation appears in a different light. Already, the employment relationship is regulated in significant ways—for example, through the imposition of a minimum wage and basic health and safety standards. These laws reflect a social judgment that not all aspects of work or the worker should be subject to unfettered market exchange; some aspects—for example, bodily integrity—are too closely related to our ideals of personhood to allow them to be fully commodified. Similarly, legal protection of employee privacy—at least of those areas recognized to be at the core of individual privacy—need not depend on evidence of market inefficiencies, but may be justified as a way of guaranteeing to the individual the space necessary for human flourishing.

Distinct from claims about efficiency, a second argument which is frequently made against any interference with the "natural" workings of the market invokes principles of freedom of contract and autonomy.[179] Because the parties to an employment relationship are in the best position to judge their interests and the potential benefits and costs involved in contracting, the courts and legislatures have no business inquiring into the terms of the bargain: "It should be enough . . . that the people who enter into an agreement have manifested their consent to it."[180] In this view, if employer and employee agree that the employment may be terminated for any reason at all—including disputes over workplace privacy—then the law ought not to interfere with their freedom to do so; the parties could as easily agree that the employer's power to fire not extend to such a situation. Thus, employee privacy rights, like any other term or condition of employment, would be established solely through the assent of the bargaining parties.

Clearly, employee privacy rights can be established as a matter of contract.

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178 *Id.* at 189.

179 "The first way to argue for the contract at will is to insist upon the importance of freedom of contract as an end in itself. Freedom of contract is an aspect of individual liberty . . . ." Epstein, *supra* note 41, at 953.

180 RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 149 (1992).

When an employer explicitly undertakes to respect its employees' privacy, its promises may be enforced like any other express term of an employment contract. For example, in challenging her dismissal for dating a former coworker who left to work for a competitor, the plaintiff in *Rulon-Miller v. IBM* relied on a memo setting forth the company's "strict regard" for its employees' personal privacy.[181] "[B]ased on substantive direct contract rights" flowing from IBM's policies, the court concluded that the plaintiff had a right of privacy in her personal life.[182] Similarly, the court in *Johnson v. Carpenter Technology Corp.*[183] permitted a breach of contract claim where the plaintiff was fired after his employer allegedly failed to follow its own written procedures for implementing a drug testing plan.[184] Thus, an employer's express policies or procedures relating to privacy may create enforceable contract rights in the employee.[185]

A more difficult question arises when the employer invokes contract principles to negate socially established expectations of privacy the employee might otherwise have. Strict adherents of the principle of freedom of contract would argue that even the most intrusive and degrading employer practices are legally permissible so long as the employee has expressly or impliedly consented to those conditions of employment.[186] In *Jennings v. Minco*

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[181] Rulon-Miller v. IBM, 208 Cal. Rptr. 524, 530 (Cal. Ct. App. 1984). The memo, which was signed by the Chairman of IBM, stated:

> We have concern with an employee's off-the-job behavior only when it reduces his ability to perform regular job assignments, interferes with the job performance of other employees, or if his outside behavior affects the reputation of the company in a major way. . . . Action should be taken [on the basis of such behavior] only when a legitimate interest of the company is injured or jeopardized.

Id.

[182] *Id.* at 532.

[183] 723 F. Supp. 180 (D. Conn. 1989).

[184] *See id.* at 184.

[185] To the extent that an employee's expectations of privacy are created wholly by contract, they should be waivable on the same grounds. Consider as an example an employer who has in the past provided private offices to certain of its professional employees, but decides to reassign these same individuals to work stations in a large common room. Although the affected employees have suffered a relative loss of privacy, their changed working conditions may be seen as merely an adjustment in the contractual terms of their employment. So long as no fundamental social norms regarding personal privacy are threatened, the concerns I raise below about the voluntariness of consent are not particularly urgent.

[186] Of course, consent *is* a defense to a tort action for invasion of privacy. However, the critical question here is not whether consent should be a defense, but whether

Technology Labs, Inc.,[187] the Texas Appeals Court relied on such reasoning to reject a challenge to an employer's random drug testing plan. Under the company's plan, employees were asked to provide a urine sample together with written consent to its analysis.[188] Although the court acknowledged that the plan "obviously portends an invasion of [plaintiff's] privacy interest" and that "privacy is an essential aspect of any tolerable way of life,"[189] it concluded that the employer "threatens no *unlawful* invasion" of privacy, because the urinalysis would be conducted *only if the employee consented.*[190] Of course, if an employee declined to consent to the testing, her employment might be terminated.[191]

The problem with the reasoning of the *Jennings* court and the usual libertarian argument based on autonomy is that they fail to acknowledge that the "voluntariness" of consent depends upon background conditions. An employee offered the choice between submitting to an intrusive and degrading search procedure required by her employer and losing her job might rationally choose to undergo the search, particularly if she must rely on her income to meet ongoing financial commitments or if she stands to lose a substantial and irreplaceable investment in seniority and its attendant benefits accumulated over her years of employment. Change any of these background conditions or, more fundamentally, the distribution of legal entitlements (which currently may permit the employer to fire her for objecting to even unjustified intrusions on privacy), and she will no longer consent to the search.[192] Her consent may be

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acquiescence obtained under threat of discharge constitutes valid consent.

[187] 765 S.W.2d 497 (Tex. Ct. App. 1989).

[188] *See id.* at 498.

[189] *Id.* at 499.

[190] *Id.* at 502 (emphasis in original).

[191] *See id.* at 498.

[192] I acknowledge that the force of this argument is considerably weakened if the employer extracts the consent of the employee to potentially invasive tests or practices *up front*, before she has made any significant investment in the particular job. Where a highly compensated employee is fully informed of the extent, nature, and circumstances of any required testing before she is hired and she nevertheless accepts the job, the concerns I raise about the voluntariness of consent are less pressing. If there are indicia that full disclosure and an opportunity for true bargaining occurred, conditions assuring a measure of voluntariness are present. Not all prehire disclosures are sufficient to meet these concerns, however. For example, in *Cordle v. General Hugh Mercer Corp.*, 325 S.E.2d 111 (W. Va. 1984), the employer, which operated a motel, apparently required applicants for positions such as cleaning maid, to sign an agreement that they could be required to take a physical exam, polygraph exam, and could be subjected to a search of their person, vehicle, and personal effects whenever they were on the premises. *See id.* at 112–13 n.2. Such a blanket waiver of the employee's privacy rights, with no specification of the scope of the waiver or

considered "voluntary" in the sense that it is the product of deliberative choice; however, from a broader perspective, which takes into account the concrete circumstances in which the choice is made, her consent may be seen as coerced.[193]

The libertarian would reject such an argument out of hand, as did the *Jennings* court: "A competent person's legal rights and obligations, [under contract law], cannot vary according to his economic circumstances."[194] Nevertheless, even the strictest libertarian acknowledges that *some* circumstances warrant setting contracts aside.[195] The easiest case is physical duress; an agreement entered into under threat of physical harm will not be enforced despite the apparent assent of the parties. This exception is generally explained on the grounds that agreement was coerced, rather than truly voluntary. However, as Kronman points out, such an agreement has in a sense been voluntarily entered into: it represents the implementation of a rational decision in response to the alternatives presented.[196] "Voluntariness," then, depends on more than deliberative choice; we are also concerned about the circumstances under which consent was given. Once this much is admitted, however, a principled justification is required for considering some

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the circumstances under which they might be tested or searched, also raises concerns about the voluntariness of consent, particularly where the employees affected are low-skilled workers unlikely to have significant negotiating power.

[193] Taken to its logical extreme, strict adherence to the fiction of voluntary consent can lead to absurd results. For example, in *Texas Employment Comm'n v. Hughes Drilling Fluids*, 746 S.W.2d 796 (Tex. Ct. App. 1988), the court considered whether an employee who was fired when he refused to submit to urinalysis drug testing was disqualified from receiving unemployment benefits. The court found that the employer's policies "*require* [plaintiff] to give *both* his consent and the urine specimen." *Id.* at 800 (first emphasis added). His refusal to "voluntarily" consent constituted "serious misconduct" justifying a denial of benefits. *Id.* at 802. In effect, a doctrine based on the notion of voluntary agreement became a *requirement* that consent be given.

[194] Jennings v. Minco Tech. Labs, Inc., 765 S.W.2d 497, 502 (Tex. Ct. App. 1989).

[195] Physical duress, incapacity of one of the contracting parties, fraud, and misrepresentation are readily acknowledged as limitations on the basic principle of freedom of contract. *See, e.g.*, RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 80–82 (1995) [hereinafter EPSTEIN, SIMPLE RULES].

[196] Suppose that I sign a contract to sell my house for $5,000 after being physically threatened by the buyer. It is possible to characterize my agreement as voluntary in one sense: after considering the alternatives, I have concluded that my self-interest is best served by signing and have deliberately implemented a perfectly rational decision by doing precisely that.

Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 477 (1980).

circumstances (e.g. threats of physical harm) relevant to determining the voluntariness of consent, and others (for example, economic necessity) not.

Epstein suggests that the assumption of mutual gain from exchange which underlies the principle of freedom of contract also prescribes its limits: "When bargaining takes place in settings where mutual gain is not the probable outcome, there is sufficient warrant for the law to step in to set that transaction aside."[197] He claims that this principle can explain the recognized common law exceptions—like fraud, duress, and insanity—to enforcement of a contract. However, in order to be useful as a limiting principle, Epstein's account must be able to identify when "mutual gain" is and is not the "probable outcome." If, as Epstein implies, mutual gain is presumed to result whenever rational, self-interested actors freely consent to an exchange, then we are back to the question of assessing the voluntariness of an agreement reached under a specific set of concrete conditions. Without an independent theory to explain which circumstances are relevant to determining whether consent was freely given, we cannot assume that mutual gain will result from the mere fact that an exchange has occurred.

My purpose here is not to offer a theory to resolve this line-drawing problem. I point out the difficulty of finding a principled way to distinguish fully voluntary from coerced agreements only in order to illustrate the indeterminacy inherent in the notion of consent. Depending upon what circumstances are deemed relevant to consider, the same contract may appear more or less freely entered. Once this indeterminacy is recognized, invoking the doctrine of consent no longer has conclusive weight. Rather, formal application of the doctrine must be tempered with a recognition and consideration of the concrete conditions under which consent was obtained.

When dealing with issues of privacy, this caution should apply with particular force. As discussed above, privacy rights are crucially linked to an individual's control over her territorial preserves. A loss of control compromising individual privacy may be effected by coercing an individual to waive her legitimate territorial claims, as well as by a direct intrusion. Thus, when the employer of an at-will employee seeks access to those areas at the socially recognized core of personal privacy, the employee's control over territories of the self is seriously threatened. Although her claim to control those core areas is heavily symbolic of her status as a member of the community, the employee can now assert those claims only at great cost. If the employee accedes to an employer's intrusion under such circumstances, a sort of false intimacy results. The employer gains access to aspects of individual life not legitimately within the scope of the employment relationship by wielding its

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[197] EPSTEIN, SIMPLE RULES, *supra* note 195, at 80.

economic power, rather than through the truly unconstrained choices of the employee. It is this possibility—that economic circumstances might induce the employee to agree to a form of self-violation—that the formal doctrine of consent fails to acknowledge.

VI. PRIVACY RIGHTS AS PUBLIC POLICY

At this point it is helpful to turn from abstract principle back to positive law. While theorists may disagree about the conditions under which consent is truly voluntary, the courts have increasingly been willing to acknowledge that in the employment context "freedom of contract" may at times be illusory.[198] Because employer and employee "do not stand on equal footing,"[199] employer power may be wielded to achieve socially undesirable ends. In order to maintain "a proper balance" between "the employer's interest in operating a

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[198] For example, in interpreting Pennsylvania's statute restricting the use of polygraphs in employment, the Third Circuit held that a consent form signed by an employee is not valid to release the employer from liability when signing the release was required as a condition of employment. *See* Polsky v. Radio Shack, 666 F.2d 824, 829 (3d Cir. 1981). The court recognized that in such a situation, "'there [is no] assurance of true voluntariness for the economic compulsions are generally such that the employee has no realistic choice.'" *Id.* at 828 (quoting State v. Community Distrib., Inc., 317 A.2d 697, 699 (N.J. 1974)).

In *Leibowitz v. H.A. Winston Co.*, 493 A.2d 111 (Pa. Super. Ct. 1985), a Pennsylvania court went even further, finding that a discharged employee might prove compulsion invalidating a release of liability under the polygraph statute even in the absence of any evidence that he was required to sign the release under threat of discharge. In light of the "disparate positions of power" of employee and employer, the court held that the question of the voluntariness of the release should go to the jury unless the employee had requested the test himself, or the employer had explicitly assured him that taking the test was not a necessary condition of employment. *Id.* at 116.

The recognition that apparent consent by an employee may mask actions taken under economic compulsion also underlies judicial interpretation of Title VII as prohibiting sexual harassment. Thus, the United States Supreme Court in *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986), held that

> the fact that sex-related conduct [between plaintiff and her supervisor] was "voluntary," in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. . . . The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.

Id. at 68.

[199] Palmateer v. International Harvester Co., 421 N.E.2d 876, 878 (Ill. 1981).

business efficiently and profitably, the employee's interest in earning a livelihood, and society's interest in seeing its public policies carried out,"[200] courts have stepped in to limit the employer's right of dismissal. Today, the overwhelming majority of states recognize a public-policy exception to the at-will rule.[201]

The seminal case is *Petermann v. International Brotherhood of Teamsters*,[202] in which the plaintiff alleged that he was discharged for refusing to give false testimony before a legislative committee at his employer's direction.[203] Although Petermann was an at-will employee, the court reasoned that permitting an employer to condition the plaintiff's continued employment on his committing perjury would encourage criminal conduct and "contaminate the honest administration of public affairs."[204] Concluding that public policy forbade such a result, the court found that the employer's right to discharge may be limited by "considerations of public policy."[205]

Numerous courts soon followed *Petermann* and recognized a cause of action for wrongful discharge in violation of public policy.[206] Once an exception to the at-will rule was admitted, courts struggled with the further question of how "public policy" should be defined. In its broadest formulation, "public policy concerns what is right and just and what affects the citizens of the State collectively."[207] A few courts have focused on the *nature* of the interests at stake, finding public policy to protect matters that "strike at the heart of a citizen's social rights, duties, and responsibilities."[208] More commonly, courts have attempted to delineate the boundaries of public policy by identifying its possible sources. Some states restrict the sources of public

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[200] *Id.*; *see also* Martin Marietta Corp. v. Lorenz, 823 P.2d 100, 105 (Colo. 1992); Pierce v. Ortho Pharm. Corp., 417 A.2d 505, 511 (N.J. 1980).

[201] One recent survey of state court decisions found that out of the 50 states and the District of Columbia, 44 jurisdictions have recognized a public-policy exception to the at-will rule in one form or another, five have rejected it, and two have never addressed the issue. 9A Lab. Rel. Rep. (BNA) IERM 505:51-3-4 (May 1996).

[202] 344 P.2d 25 (Cal. Dist. Ct. App. 1959).

[203] *See id.* at 26.

[204] *Id.* at 27.

[205] *Id.*

[206] The cause of action is sometimes also called "abusive discharge," *see, e.g.*, Adler v. American Standard Corp., 432 A.2d 464, 473 (Md. 1981), or "retaliatory discharge," *see, e.g.*, Palmateer v. International Harvester Co., 421 N.E.2d 876, 880 (Ill. 1981); Frampton v. Central Ind. Gas Co., 297 N.E.2d 425, 428 (Ind. 1973).

[207] *Palmateer*, 421 N.E.2d at 878.

[208] *Id.* at 878–79; *see also* Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123, 1132 (Alaska 1989); Yetter v. Ward Trucking Corp., 585 A.2d 1022, 1026 (Pa. Super. Ct. 1991).

policy to criminal codes,[209] or to express statutory or constitutional provisions;[210] many consider judicial decisions a relevant source of public policy as well.[211]

However defined, the public-policy exception is now widely recognized to apply in at least three types of situations: when an employee is discharged for refusing to commit an illegal act, for asserting an established job-related right (for example, by filing for workers' compensation benefits), or for fulfilling a public obligation (such as serving on jury duty).[212] The justification for a public-policy exception is often said to be the prevention of harm to third parties.[213] While this rationale easily applies to most situations of the first type, third-party effects are not always present when tort liability is imposed. The second well-established exception to the at-will rule—a dismissal for performing a public duty such as jury service—threatens no direct harm to others. Although the integrity of the jury system as a whole may be affected,

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[209] *See, e.g.*, Adams v. George W. Cochran & Co., 597 A.2d 28, 34 (D.C. 1991); Miller v. Fairfield Communities, Inc., 382 S.E.2d 16, 19 (S.C. Ct. App. 1989); Sabine Pilot Service, Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985).

[210] *See, e.g.*, Sterling Drug, Inc. v. Oxford, 743 S.W.2d 380, 385 (Ark. 1988); Gantt v. Sentry Ins., 824 P.2d 680, 687–88 (Cal. 1992); Firestone Textile Co. Div. v. Meadows, 666 S.W.2d 730, 732–33 (Ky. 1983); Lynch v. Blanke Baer & Bowey Krimko, Inc., 901 S.W.2d 147, 150 (Mo. 1995); Reynolds v. Ozark Motor Lines, Inc., 887 S.W.2d 822, 823–24 (Tenn. 1994); Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 840 (Wis. 1983).

[211] *See, e.g.*, *Luedtke*, 768 P.2d at 1132; Wagenseller v. Scottsdale Mem'l. Hosp., 710 P.2d 1025, 1034 (Ariz. 1985); Parnar v. Americana Hotels, Inc., 652 P.2d 625, 631 (Haw. 1982); *Palmateer*, 421 N.E.2d at 878; Phipps v. Clark Oil & Ref. Corp., 396 N.W.2d 588, 593 (Minn. Ct. App. 1986), *aff'd*, 408 N.W.2d 569 (Minn. 1987); Pierce v. Ortho Pharm. Corp., 417 A.2d 505, 512 (N.J. 1980); Gutierrez v. Sundancer Indian Jewelry, Inc., 868 P.2d 1266, 1272 (N.M. Ct. App. 1994); Painter v. Graley, 639 N.E.2d 51, 56 (Ohio 1994); Burk v. K-Mart Corp., 770 P.2d 24, 29 (Okla. 1989); Banaitis v. Mitsubishi Bank, Ltd., 879 P.2d 1288, 1294 (Or. Ct. App. 1994); *Yetter*, 585 A.2d at 1027; Johnson v. Kreiser's Inc., 433 N.W.2d 225, 227 (S.D. 1988); Payne v. Rozendaal, 520 A.2d 586, 588–89 (Vt. 1986); Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1089 (Wash. 1984); Dynan v. Rocky Mountain Fed. Sav. & Loan, 792 P.2d 631, 640 (Wyo. 1990); *cf.* Cloutier v. Great Atl. & Pac. Tea Co., 436 A.2d 1140, 1144 (N.H. 1981) (public policy not limited to statute).

[212] *See, e.g.*, Sorensen v. Comm Tek, Inc., 799 P.2d 70, 74 (Idaho 1990) (listing three categories of recognized public-policy exceptions); Yovino v. Fish, 539 N.E.2d 548, 550 (Mass. App. Ct. 1989) (same); *Banaitis*, 879 P.2d at 1293 (same). Some courts also list a fourth type of commonly recognized public-policy exception: reporting an alleged violation of law or whistle blowing. *See Gantt*, 824 P.2d at 684.

[213] *See* Stewart J. Schwab, *Wrongful Discharge Law and the Search for Third-Party Effects*, 74 TEX. L. REV. 1943 (1996).

even this danger is remote given the numerous exemptions from jury duty already provided for in most state laws. This exception then, can only be explained by the fundamental value this society places on jury service, rather than any threat of actual harm to the public. It reflects a judgment that because "the jury system and jury duty are regarded as high on the scale of American institutions,"[214] the employee should not be forced to choose between her job and this basic form of political participation.

Third-party effects cannot explain the protection afforded employees who file for workers' compensation benefits, either. Dismissal of these employees would not harm anyone outside the employment relationship. Only the injured employee, forced to choose between foregoing compensation benefits and risking the loss of her job is affected. Of course, there *is* an important public policy at stake—that of insuring adequate, certain, and expeditious support to injured workers[215]—but that policy is not justified in terms of third-party effects. The public may benefit indirectly, for example, if injured workers rely less on public assistance, but the legislation is intended primarily for the protection of the worker.[216] Recognizing a public-policy exception in this situation, then, protects not third parties, but the public interest in regulating certain terms of the employment relationship itself and insuring that the threat of discharge is not used to deprive workers of rights to which they are otherwise entitled.[217]

Despite some uncertainty over how public policy should be defined, the basic structure of the wrongful discharge tort is well established. An employee, even an at-will employee, may seek damages from her employer for wrongful discharge if the reasons for her dismissal are contrary to public policy. Her at-will status is irrelevant because the requirements of public policy are determined by the public interest and imposed independently of the terms of the employment contract. Because the duty violated arises not from the parties' agreement, but is one that is socially imposed,[218] most courts have held that the cause of action sounds in tort, and the employer may be liable for all consequential damages suffered by the dismissed employee and, in egregious cases, punitive damages.[219]

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[214] Nees v. Hocks, 536 P.2d 512, 516 (Or. 1975).

[215] *See* Frampton v. Central Ind. Gas Co., 297 N.E.2d 425, 427 (Ind. 1973).

[216] *See id.*

[217] *See id.*; Firestone Textile Co. Div. v. Meadows, 666 S.W.2d 730, 734 (Ky. 1983).

[218] *See, e.g.*, Foley v. Interactive Data Corp., 765 P.2d 373, 377–78 (Cal. 1988); Phillips v. Butterball Farms Co., 531 N.W.2d 144, 147–48 (Mich. 1995).

[219] A few states have followed the Wisconsin Supreme Court's holding in *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 841 (Wis. 1983), that the public-policy exception is predicated on the breach of an implied provision not to discharge an employee for refusing

The common law privacy tort, by prohibiting unreasonable intrusions on the private concerns of another, also imposes a socially defined duty independent of any contractual relationship between the parties. Like participation in the jury system, respect for personal privacy is high on the scale of values in this society. And, as in the case of workers' compensation benefits, an employee's common law right of privacy is socially established independent of the terms of the employment relationship[220] and should not be subject to waiver under threat of discharge. Because the interests it protects are at least as fundamental as others already found to warrant an exception to the at-will rule, the common law tort of invasion of privacy should be recognized as a public policy limiting an employer's authority to discharge.

It might be objected that privacy rights are by definition "private" and therefore *cannot* be matters of "public" policy.[221] Despite its superficial

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to violate a clear mandate of public policy and, therefore, only contract damages are available. *See, e.g.*, Sterling Drug, Inc. v. Oxford, 743 S.W.2d 380, 385 (Ark. 1988); Johnson v. Kreiser's Inc., 433 N.W.2d 225, 227 (S.D. 1988). However, the overwhelming weight of authority holds that wrongful termination in violation of public policy is a tort. *See Foley*, 765 P.2d at 377–78; Adams v. George W. Cochran & Co., 597 A.2d 28, 34 (D.C. 1991); Parnar v. Americana Hotels, Inc., 652 P.2d 625, 631 (Haw. 1982); Springer v. Weeks & Leo Co., 429 N.W.2d 558, 560–61 (Iowa 1988); *Firestone*, 666 S.W.2d at 733; *Phillips*, 531 N.W.2d at 147–48; Phipps v. Clark Oil & Ref. Corp., 396 N.W.2d 588, 592 (Minn. Ct. App. 1986), *aff'd*, 408 N.W.2d 569 (Minn. 1987); Pierce v. Ortho Pharm. Corp., 417 A.2d 505, 512 (N.J. 1980); Gutierrez v. Sundancer Indian Jewelry, Inc., 868 P.2d 1266, 1272 (N.M. Ct. App. 1994); Burk v. K-Mart Corp., 770 P.2d 24, 28 (Okla. 1989); Ludwick v. This Minute of Carolina, Inc., 337 S.E.2d 213, 216 (S.C. 1985); Reynolds v. Ozark Motor Lines, Inc., 887 S.W.2d 822, 825 (Tenn. 1994); Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1089 (Wash. 1984); Harless v. First Nat'l Bank, 246 S.E.2d 270, 275 n.5 (W. Va. 1978).

[220] It may be argued that limiting the employer's right to discharge an employee for claiming workers' compensation benefits is justified because the rights at issue are *statutorily* granted, while the right of privacy is based solely on the common law. Why this distinction should make a difference, however, is not entirely clear. *See infra* text accompanying notes 225–28.

[221] For example, the court in *Luck v. Southern Pac. Transp. Co.*, 267 Cal. Rptr. 618 (Cal. Ct. App. 1990), rejected a dismissed employee's claim that mandatory drug testing violated her right of privacy on the grounds that "[t]he right to privacy is, by its very name, a private right, not a public one" and therefore could not be the basis for a public-policy exception to the at-will rule. *Id.* at 635.

In reaching this conclusion, the *Luck* court relied on the analysis employed by the California Supreme Court in *Foley v. Interactive Data Corp.*, 765 P.2d 373 (Cal. 1988). Foley alleged that he was fired in retaliation for informing his employer that his new supervisor was under investigation for embezzlement from a previous employer. *See id.* at 375. In rejecting his wrongful discharge claim, the California Supreme Court stated:

appeal, this argument misapprehends the nature of the interests at stake. The function of a right of privacy is to delineate those territories or preserves which are fundamental to the individual's sense of self and to provide legal sanction to her claim to exclusive control within those boundaries. The location of those boundaries is not a matter of individual choice or preference; rather, they are *socially* defined, reflecting community norms and practices. Because the privacy tort upholds those "civility rules" that "give normative shape and substance to the society that shares them,"[222] the general community, not just the affected individual, has an interest in their enforcement.

To the extent that judicial decisions are recognized as sources of public policy, protecting employee privacy rights by limiting an employer's authority to fire at will poses no particular doctrinal difficulties. The common law tort of invasion of privacy is widely recognized and clearly expresses a public policy to protect individuals from "highly offensive" intrusions on their solitude or private affairs and concerns.[223] In jurisdictions where state or federal

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> The absence of a distinctly "public" interest in this case is apparent when we consider that if an employer and employee were *expressly* to agree that the employee has no obligation to, and should not, inform the employer of any adverse information the employee learns about a fellow employee's background, nothing in the state's public policy would render such an agreement void. By contrast, in the previous cases asserting a discharge in violation of public policy, the public interest at stake was invariably one which could not properly be circumvented by agreement of the parties.

Id. at 380 n.12 (emphasis in original).

Applying this test to the facts before it, the *Luck* court concluded that "[t]he parties could have lawfully agreed that Luck would submit to urinalysis without violating any public interest." *Luck*, 267 Cal. Rptr. at 635. The problem with the test advanced by the *Foley* court is that it is wholly tautological. It merely identifies the central question—whether an agreement to do or refrain from certain actions is so offensive to public policy as to be void—but does not help to answer it. Under this test, the court in *Luck* could just as easily have concluded, as did the court in *Semore v. Pool*, 266 Cal. Rptr. 280, 285 (Cal. Ct. App. 1990), that an employment agreement conditioned on submission to random drug testing is unenforceable as violative of public policy.

222 Post, *supra* note 94, at 964.

223 Generally, exceptions to the at-will rule must be based on a "clear mandate of public policy," and some courts have taken the vigorous public debate over the legitimacy of employer surveillance and testing policies as evidence that privacy rights are not "firmly established." *See, e.g.*, *Luck*, 267 Cal. Rptr. at 635. This argument, however, confuses the status of the underlying right with its application in a particular situation. No one seriously doubts the fundamental value placed on free speech in our constitutional jurisprudence, despite heated debates over its force and scope when it clashes with other important social interests. Similarly, the common law right of privacy is clearly established in this sense:

constitutional provisions are also recognized as appropriate sources of public policy, the case for recognizing protection of employee privacy as an exception to the at-will rule is further buttressed. Although they rarely apply directly to private actors, the widely recognized constitutional protections of personal privacy may properly be looked to as evidence of public *values*.[224]

Some jurisdictions, however, insist that any exception to the at-will rule must have a statutory basis,[225] precluding reliance on the common law right of privacy as a source of public policy. Such a rule which looks only to statutes to provide public policy can lead to "legal contortions"[226] as courts attempt to fit terminations generally offensive to public policy into the narrow parameters of existing statutes. The rationale for requiring such contortions before recognizing a public policy are not at all clear, for judicial decisions often embody fundamental public concerns as significant as those expressed by statute.

The argument that the declaration of public policy is the prerogative of the legislature, not the courts, proves too much. If the legislature is the only legitimate source of public policy, the courts ought not recognize *any* exceptions to the at-will rule. The legislature could as easily prohibit terminating an employee for refusing to commit perjury as the perjury itself. Its failure to do so arguably represents a policy choice. Similarly, the legislature could specifically prohibit retaliation against workers who file for compensation

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virtually all jurisdictions unambiguously prohibit offensive intrusions by private actors. Although application to a particular employer practice may be disputed, the existence of a common law right of privacy is clear.

[224] *See, e.g.*, Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123, 1132–33 (Alaska 1989) (finding that although Alaska's constitutional right of privacy directly limits only state action, it provides evidence of a general public policy supporting privacy); *see also* Grodin, *supra* note 159; Summers, *supra* note 159; *cf.* Novosel v. Nationwide Ins. Co., 721 F.2d 894, 900 (3d Cir. 1983) (finding that constitutional rights of freedom of speech and association express a public policy sufficient to support a common law action for wrongful discharge).

[225] *See* cases cited *supra* note 209. To the extent that an employee's claim of invasion of privacy relates to an employer practice which is specifically regulated by state statute, she would have little difficulty in stating a claim for wrongful discharge in violation of public policy. *See, e.g.*, Perks v. Firestone Tire & Rubber Co., 611 F.2d 1363, 1365–66 (3d Cir. 1979). For references compiling state statutes regulating specific employer testing or information-gathering practices, see sources cited *supra* note 16. Only a few states, however, have a statute protecting individual privacy rights generally. *See* MASS. GEN. LAWS ANN. ch. 214, § 1B (West 1989); NEB. REV. STAT. § 20-203 (1991); R.I. GEN. LAWS § 9-1-28.1 (1985); WIS. STAT. ANN. § 895.50 (West 1983).

[226] STEVEN L. WILLBORN ET AL., EMPLOYMENT LAW CASES AND MATERIALS 84 (1993).

benefits; yet, courts have been willing to infer that the public policy articulated in the enacting legislation forbids such retaliatory discharges even though the legislature chose not to say so explicitly.[227] By their very involvement in extrapolating public policy from existing statutes, and applying them in the context of at-will employment, the courts have acknowledged that they have *some* role in interpreting public policy. And by failing to act to overturn well-established common law rules, the legislature implicitly endorses the public policies they articulate.[228]

For a number of reasons, privacy rights are particularly well-suited for common law development. Claims of invasion of privacy are highly fact specific; their validity cannot be assessed without close examination of the context in which they arise. Moreover, privacy norms themselves are constantly evolving, not only in response to a changing social context, but also rapidly emerging technologies which often produce unanticipated impacts on privacy interests. Because legislative protection of privacy is necessarily piecemeal and reactive in light of such rapid change, limiting the source of public policy to specific statutes seems especially inappropriate when considering issues of privacy.

But if the distinction between statutory and common law as valid sources of public policy is arbitrary, some other method of distinguishing truly public from merely personal concerns is needed. Clearly, not every dispute between employee and employer is a matter of public policy; purely personal disputes are properly excluded.[229] In *Governing the Workplace*, Weiler offers a more

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[227] *See, e.g.*, Frampton v. Central Ind. Gas Co., 297 N.E.2d 425, 428 (Ind. 1973); Firestone Textile Co. Div. v. Meadows, 666 S.W.2d 730, 732 (Ky. 1983); Sventko v. Kroger Co., 245 N.W.2d 151, 153 (Mich. Ct. App. 1976).

[228] There is no unfairness to the employer in recognizing judicial decisions as a source of public policy. As Justice Kennard pointed out in her dissent from the California Supreme Court's ruling that the public-policy exception must be based on constitutional or statutory provisions, "Other legitimate sources of public policy, such as judicial decisions or codes of professional ethics, for instance, are readily available to employers or their counsel and thus provide no less 'notice' than do statutes or constitutional provisions." Gantt v. Sentry Ins., 824 P.2d 680, 693 (Cal. 1992) (Kennard, J., concurring and dissenting). Employers know that their conduct is bound by judicially announced rules as well as statutes and cannot complain of lack of notice if they are held liable for terminating an employee in order to evade a common law duty.

[229] Courts have uniformly rejected employee claims of wrongful discharge when the dismissal resulted from disputes over internal management issues. *See, e.g.*, Palmateer v. International Harvester Co., 421 N.E.2d 876, 879 (Ill. 1981) (citing cases in which public-policy exception not allowed where worker discharged in dispute over a company's internal management system); Smith-Pfeffer v. Superintendent of the Walter E. Fernald State School, 533 N.E.2d 1368, 1371–72 (Mass. 1989) (finding internal policy matters cannot be

precise test for identifying public policy:

> This tort action [for wrongful dismissal] should be available whenever an employer has exercised its contractual prerogative to terminate the worker's employment and in the process has flouted some value that has been authoritatively declared by the legislature or the judiciary to be in the general interest of the community. *The best test of that status would be whether the policy in question is implemented through a legal regime that operates outside the dismissal context.*[230]

Legal protections for personal privacy are well established outside the employment context: offensive intrusions by private actors are prohibited under the common law, and government actions impinging on individual privacy are restricted by the Constitution. Therefore, under Weiler's test, protection of employee privacy is sufficiently grounded in public policy to warrant an exception to the employer's ordinary prerogative to discharge at will.

Once the common law right of privacy is recognized as a public policy limiting the at-will rule, the employee stands in a wholly different position when confronted with potentially intrusive practices by her employer. Without such protection, the employer may unilaterally impose any search, testing, or surveillance procedure whether or not it is justified by business needs. No matter how unreasonable and degrading the intrusion, the employee faces a stark choice: either go along and waive her rights or object and risk losing her job. The recognition of employee privacy as a public policy works a shift in the bargaining endowments of the parties. Employers can no longer insist on burdening their employees' core privacy interests on threat of discharge, but must take account of prevailing social norms. Privacy rights will continue to be controversial; genuine disagreement over core privacy values will inevitably occur. But because of the potential for liability for threatening unjustified invasions of privacy, the employer now has a greater incentive to take account of employee concerns over the intrusiveness of a given practice and to develop procedures and alternatives for meeting its legitimate business needs which are less threatening to privacy interests. And the employee, offered some protection against the risks of job loss, is in a better position to raise concerns about personal privacy with her employer.

Opposing potentially invasive practices by the employer is not without risk for the employee, however. If she is fired in retaliation for her opposition, she

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the basis of a public-policy exception to the at-will rule); Turner v. Letterkenny Fed. Credit Union, 505 A.2d 259, 261 (Pa. Super. Ct. 1985) (refusing to recognize an exception to the at-will rule when employee dismissed because of disputes with management and fellow employees).

230 WEILER, *supra* note 168, at 100 (emphasis added).

would only be entitled to legal redress if the employer's actions had threatened a "highly offensive" intrusion on her privacy, a determination which would be made by reference to the norms of the community as a whole. Although the employee's subjective sense of violation and outrage alone would be insufficient to find a violation of public policy, whenever an employer threatened to use its economic power to invade core privacy interests, the employee would be protected in resisting the intrusion. Thus, recognizing employee privacy rights as a public-policy exception to the at-will rule would serve the very interests the common law tort is intended to safeguard—the "civility rules" which not only express the normative boundaries of the community, but define the individual's place in it.

VII. CONCLUSION

Articulating why we should care about privacy in the employment context and how we should protect it is complicated by the lack of consensus as to the meaning and value of privacy in general. With no widely accepted definition of "privacy" in use, debates about privacy protections often stall at the definitional stage, while concrete questions go unresolved. Yet despite its uncertain philosophical status, privacy remains a strongly held value, an instinctively felt need, such that perceived losses of privacy may be experienced by the individual as a form of violation.

In this Article, I have attempted to sidestep the definitional problems and address directly the legitimacy of employee concerns about invasions of privacy by employers. I have adopted a functional approach—examining the role that privacy norms, popularly understood, play in our social life, and exploring the interests of the individual in the observation and enforcement of those norms. Borrowing the insights of sociology, I have argued that the observation of privacy norms plays a central role in establishing the individual's standing in the community and is crucial to her sense of self. I have not been concerned so much with the precise content of these norms, as with the individual's ability to control when and with whom they will be waived.

Applying these insights in the employment setting, I have argued that employees retain their ordinary, socially established expectations of privacy in the workplace, except to the extent that waiver is required to achieve the purposes of the relationship itself. Any employer intrusion on core aspects of personal privacy thus requires justification, not only as to its purpose, but also as to the scope of the intrusion as well. Because of the danger that economic power might be wielded to induce a form of self-violation, I have argued that common law privacy rights should be recognized as a limitation on the traditional prerogative of the employer to fire at will.

In focusing on the role played by privacy norms in social interaction, I have left aside concerns about what exactly the scope of privacy protections ought to be. Many others have argued that our society and laws are insufficiently protective of individual privacy. They warn that through incremental incursions, each justified in the name of some greater good, we are insensibly becoming acclimated to ever greater losses of privacy. Because the common law tort of invasion of privacy looks to prevailing social norms to delineate the areas it protects, employee privacy rights are similarly vulnerable. To a large extent, the protection afforded to employees depends upon an evolving social consensus, for privacy interests in the employment context can be no more secure than they are in the society as a whole. While much work undoubtedly needs to be done to protect personal privacy against both governmental and private intrusion, my more limited concern here has been to argue that the fact of employment should make it no less secure.