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EMPLOYEE PRIVACY, AMERICAN VALUES, AND THE LAW

MATTHEW W. FINKIN*

TABLE OF CONTENTS

INTRODUCTION	222
I. THE COMMON LAW CONCEPTION OF EMPLOYEE PRIVACY	223
A. <i>Intrusion</i>	225
1. Genetic Testing	229
2. Drug Testing	230
3. Psychological Testing	232
B. <i>Autonomy</i>	235
C. <i>A Critical Summary</i>	239
II. THE SEARCH FOR VALUES	242
III. SHAPING THE LAW	254
A. <i>The "Whig Tradition"</i>	254
B. <i>The Common Law's Arrested Development</i>	256
IV. "PRIVACY" MISAPPLIED? MONITORING WORKERS BY COMPUTER	262
CONCLUSION	269

* Albert J. Harno Professor of Law and Professor in the Institute of Labor and Industrial Relations, the University of Illinois. An earlier version of this paper was given as the 18th Kenneth M. Piper Lecture on April 9, 1996. A portion of what follows is based upon a work in progress, a study of the law of employee privacy in Germany undertaken with the support of the Alexander von Humboldt Foundation.

EMPLOYEE PRIVACY, AMERICAN VALUES, AND THE LAW

INTRODUCTION

Alan Westin argues that, on the whole, our law strikes the correct balance between employee privacy and other competing interests, as evidenced by survey data indicating a general concurrence between employee and managerial perceptions.¹ Consequently, he is skeptical of the claims of "privacy fundamentalists" who would uncouple the very idea of privacy from its moorings, as evidenced by their use of the word to attack the computerized monitoring of work. He concludes that our "system"—an "eclectic blend" of common law, statutes, and contract—is in keeping with our values far more than alternatives found in Europe which, in the data protection area, are occupied by comprehensive (and intrusive) public licensing and regulatory bodies.

I am far less sanguine. I believe we often fail to protect the essentials of what the law ought to protect, that our law is discordant with our values as expressed historically and in our common parlance. Accordingly, I will suggest that some of the survey data relied upon should be more a source of disquiet than of satisfaction. Only on the last point, in the European comparison, does Westin touch upon a deeply rooted cultural value; however, I will argue that a comparison to Europe in general and to Germany in particular is especially useful because it emphasizes both the poverty of our legal conception and our institutional inability to protect significant employee privacy interests.

I do not suggest that these profound differences are unique to us. Westin advances a widely shared progressive faith in enlightened management, perhaps chastened when need be by the market; hence, the reliance on survey data, for management could scarcely act freely against overwhelming employee opposition, even if unorganized. I should like to think that the views I will express draw from even stronger historical roots, and if not currently shared by a great many in positions of power—judges and legislators—may yet persuade.

1. Alan F. Westin, *Privacy in the Workplace: How Well Does American Law Reflect American Values?*, 72 CHI.-KENT L. REV. 271 (1996).

I. THE COMMON LAW CONCEPTION OF EMPLOYEE PRIVACY

In *Privacy and Freedom*, Alan Westin addressed the many ways in which we conceive of privacy, in the varied and often nuanced meanings of the word. I wish here to single out two elements Westin identified that, though analytically segregable, overlap at points and that have loomed large in legal theory: seclusion and autonomy.²

The first speaks of one's freedom from "intrusion." This way of thinking of privacy has been applied to the disclosure of personal information, which it takes to be an interference in one's right to be "left alone." The second is grounded in a "fundamental belief in the uniqueness of the individual, in his basic dignity and worth as a creature of God and a human being," and manifests itself in "the desire to avoid being manipulated or dominated wholly by others."³ Note, however, how closely connected they are: The first might also be expressed in terms of autonomy, in one's right of informational self-determination, and the second might also be framed in terms of intrusion, in not having one's activities minded by another. Both are implicated in the modern employment relationship: To be an employee is to be in the hands of an organization that seeks to exact an enormous amount of personal information irrespective of the employee's deep desire. To be an employee is to be enmeshed in a hierarchical structure of subordination that is quite at odds with any claim of individual autonomy even over arguably private spheres of endeavor. Thus, the question of privacy is one of degree: how much information should an employer be allowed to collect and how much control should it be allowed to exert?

That "eclectic blend," our "system," determines the degree to which these interests secure legal recognition and protection. The elemental component is the common law which, we like to think, embodies the shared values of the community; i.e., in the law of torts, which assigns liability for societally imposed, non-contractual duties. With some exceptions, notably California and Massachusetts on the one hand—which have adopted broadly formulated privacy guarantees by

2. There is rich literature in philosophy and law about the idea of privacy and its meaning, including whether the concept has any independent validity, and if it has, whether autonomy is any component of it. Compare Judith Jarvis Thomson, *The Right to Privacy*, 4 PHIL. & PUB. AFF. 295 (1975) with Thomas Scanlon, *Thomson on Privacy*, 4 PHIL. & PUB. AFF. 315 (1975). See also Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421 (1980); Hyman Gross, *The Concept of Privacy*, 42 N.Y.U. L. REV. 34 (1967); Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974); Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957 (1989).

3. ALAN F. WESTIN, *PRIVACY AND FREEDOM* 33 (1967).

referendum⁴ and legislation⁵ respectively, and New York on the other, which limits privacy by statute to commercial exploitation of one's name or likeness,⁶ most states apply the formulation of the *Restatement (Second) of Torts*. The *Restatement*, however, is concerned with "social exposure, not . . . business intervention."⁷ Consequently, it speaks of privacy exclusively in terms of seclusion: in an "intrusion" or a public disclosure about one's private life that in either case "would be highly offensive to a reasonable person." It acknowledges no element of autonomy.

As a result, autonomy must find protection either in contract or in positive law. With the exception of highly paid executives, especially sophisticated professional or creative employees or others with unique skills (and high market demand), individually negotiated contracts of employment are rarely used. Employees take jobs upon conditions that management unilaterally establishes. (Though collective bargaining would give employees a voice in framing the content of some of these conditions, the percentage of employees represented by unions has declined over the past forty years to perhaps eleven percent of the civilian labor market.) In terms of positive law, the legislative response has varied from the occasional and piecemeal more often to the non-existent.

The latter may be explained for the most part by the politics of privacy, which pits organized business interests against a largely unorganized mass of individual workers. Legislative inaction, however, also resonates against the assumption that the common law articulates and protects what privacy "is." That assumption has had two consequences: It has deprived the law of the ability to advance a strong theoretical claim to privacy in the face of managerial deployment of an ever-intrusive technology, and it has enervated the capacity of the law to accommodate individual autonomy as an authentic component of privacy. Each is explored below.

4. See CAL. CONST. art. I, § 1 (1983).

5. See MASS. GEN. LAWS ANN. ch. 214, § 1B (West 1989).

6. See N.Y. CIV. RIGHTS LAW § 51 (McKinney 1992).

7. FERDINAND DAVID SCHOEMAN, *PRIVACY AND SOCIAL FREEDOM* 198 n.24 (1992). The distinction poses some interesting problems. If a neighbor stops by one's home to inquire into one's health, we would not consider such a purely social interaction invasive of privacy. Could the same be said when the caller is one's supervisor? See, e.g., *Denton v. Chittenden Bank*, 655 A.2d 703 (Vt. 1994) (holding that a supervisor did not invade his employee's privacy when he asked questions at the employee's home).

A. *Intrusion*

The most obvious instances of intrusion concern searches, surveillance, and the questioning of employees. In deciding these cases, the courts first consider the extent of the employee's "reasonable expectation" of privacy in the premises. Opening an employee's mail clearly marked "personal" invades privacy;⁸ opening mail only to ascertain if it concerns the business would not.⁹ Conducting employee surveillance in a restroom invades privacy;¹⁰ conducting surveillance of the entrance to a restroom would not, absent any person being seen in a state of undress.¹¹ Searching an employee's personal credit card receipts invades privacy;¹² searching employee lunch buckets¹³ or a car parked on the company lot would not.¹⁴ Searching an employee's locker to which the company allowed the employee a key might invade his privacy,¹⁵ but searching an employee's desk, when no personal documents were read or property taken, does not.¹⁶ Questioning an employee about the details of her sex life invades her privacy;¹⁷ questioning an employee about his marital status, number of dependents and siblings, or home ownership does not.¹⁸

Because these cases all apply a test predicated upon "reasonable expectations" and then, after determining that such an expectation exists, require the intrusive activity to be "highly offensive" in order im-

8. See *Vernars v. Young*, 539 F.2d 966, 968-69 (3d Cir. 1976).

9. See *Doe v. Kohn Nast & Graf, P.C.*, 866 F. Supp. 190 (E.D. Pa. 1994) (dictum). The court opined:

The method by which an employer carries out an authorized inquiry into an employee's private concerns may constitute an intrusion upon the employee's seclusion if that method fails to give due regard to the employee's privacy or reveals personal matters unrelated to the workplace . . . In this case, even if defendants reasonably believed that the letters to plaintiff from media outlets were related to firm business, the defendants might still have invaded plaintiff's privacy by retaining copies of the letters, once they had determined that the letters were personal, and sending them on to plaintiff without informing him that the letters had been opened.

Id. at 196.

10. See *Speer v. Ohio Dep't of Rehabilitation & Correction*, 624 N.E.2d 251, 254 (Ohio Ct. App. 1993).

11. See *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1183 (7th Cir. 1993).

12. See *Pulla v. Amoco Oil Co.*, 882 F. Supp. 836, 867 (S.D. Iowa 1994), *aff'd in part and rev'd in part*, 72 F.3d 648 (8th Cir. 1995).

13. See *Simpson v. Unemployment Compensation Bd. of Rev.*, 450 A.2d 305, 309 (Pa. Commw. Ct. 1982).

14. See *Terrell v. Rowsey*, 647 N.E.2d 662, 665 (Ind. Ct. App. 1995).

15. See *K-Mart Corp. Store No. 7441 v. Trotti*, 677 S.W.2d 632, 637 (Tex. App. 1984).

16. See *Moffett v. Gene B. Glick Co.*, 621 F. Supp. 244, 284 (N.D. Ind. 1985), *abandoned on other grounds*, *Reeder-Baker v. Lincoln Nat. Corp.*, 644 F. Supp. 983 (N.D. Ind. 1986); *O'Bryan v. KTIV Television*, 868 F. Supp. 1146, 1159 (N.D. Iowa 1994).

17. See *Phillips v. Smalley Maintenance Servs., Inc.*, 711 F.2d 1524, 1537 (11th Cir. 1983).

18. See *Cort v. Bristol-Myers Co.*, 431 N.E.2d 908, 914 (Mass. 1982).

permissibly to have invaded privacy, the results recited seem altogether reasonable. But, I will suggest three reasons to believe that there is more here than meets the eye.

First, to the extent the reasonableness of the legitimate expectation of privacy is determined on objective grounds, it would rest upon employer policies, practices, or assurances in the matter only in the absence of which would the judgment have to turn to external norms. As others have noted, this bids fair to eviscerate any claim to privacy at all.¹⁹ For example, it is unsurprising that a lawyer would advise employers to minimize liability for workplace searches by, among other things, distributing a search policy to employees, posting signs about the workplace reminding them of their being subject to search, and, periodically, actually performing searches ostensibly for no reason other than to show that it is done.²⁰ In the credit card case just mentioned, the court stressed that the company had used the employee's credit card records "for a purpose for which they were never intended," to check the dates of usage against the dates the employee claimed to be sick at home, and it did so "without notice to, or consent or knowledge of, the credit card holder."²¹ The fair implication is that nothing in the law of privacy would prevent an employer from establishing a rule beforehand that disclosure of credit card usage would be a condition of employment in order to assure that sick leave was not being abused.²²

Second, where the particular employer has not objectively established the non-expectation of privacy beforehand, the courts fall back upon external norms—but these in turn rest on business practice. In *Cort v. Bristol-Myers Co.*,²³ the court noted that some of the questions asked about family and finances that would seem to have no relation to the job or to any legitimate information the employer needed to know, were nevertheless "no more intrusive than those asked on an application for life insurance or for a bank loan."²⁴ The same reason-

19. See, e.g., Don Mayer, *Workplace Privacy and the Fourth Amendment: An End to Reasonable Expectations?*, 29 AM. BUS. L.J. 625, 663 (1992).

20. See David John Hoekstra, *Workplace Searches: A Legal Overview*, 47 LAB. L.J. 127, 138 (1996).

21. Pulla v. Amoco Oil Co., 882 F. Supp. 836, 867 (S.D. Iowa 1994), *aff'd in part and rev'd in part*, 72 F.3d 648 (8th Cir. 1995).

22. Cf. *Rule Change by Fidelity*, N.Y. TIMES, July 13, 1994, at D3, reporting that Fidelity Investments was requiring its 13,700 employees to conduct their personal brokerage trades with the firm rather than with brokers of their choice, to "allow Fidelity to track the personal trading patterns of its employees more easily."

23. 431 N.E.2d 908.

24. *Id.* at 914.

ing was applied by the Supreme Court of Florida to a question on use of tobacco as a condition of employment. It found that the question did

not intrude into an aspect of Kurtz' [the applicant's] life in which she has a legitimate expectation of privacy. In today's society, smokers are constantly required to reveal whether they smoke. When individuals are seated in a restaurant, they are asked whether they want a table in a smoking or non-smoking section. When individuals rent hotel or motel rooms, they are asked if they smoke so that management may ensure that certain rooms remain free from the smell of smoke odors. Likewise, when individuals rent cars, they are asked if they smoke so that rental agencies can make proper accommodations to maintain vehicles for non-smokers. Further, employers generally provide smoke-free areas for non-smokers, and employees are often prohibited from smoking in certain areas. Given that individuals must reveal whether they smoke in almost every aspect of life in today's society, we conclude that individuals have no reasonable expectation of privacy in the disclosure of that information when applying for a government job²⁵

Note the logic: if a life insurance company asks the number of an applicant's siblings or a restaurant asks a customer's smoking preference, so too may an employer. For example, where an employer used a computer in violation of its policy (which policy one would think the employee had a reasonable expectation would be observed), to survey an employee to see how much overtime she was failing to record, the court found no tort (not of privacy but of emotional distress) because "employers routinely engage in a variety of practices" to confirm the accuracy of employee records.²⁶ And if those, why not this?

Third, the privacy interest implicated is conceived of in very narrow terms. One has no privacy interest in not having one's desk "ransacked,"²⁷ only in not having one's personal communications read that are left on or in the desk. One has no privacy interest in not being subjected to hidden video surveillance, only in not being surveilled in a restroom. One has no privacy interest in not being subject to a questionnaire, only in not answering certain very personal questions. This is so because the legal conception of the interest in "seclusion" lies not in a freedom from intrusion, but only in a freedom from *offensive* in-

25. *City of North Miami v. Kurtz*, 653 So. 2d 1025, 1028 (Fla.), *cert. denied*, 116 S. Ct. 701 (1995).

26. *Schibursky v. International Bus. Mach. Corp.*, 820 F. Supp. 1169, 1183 (D. Minn. 1993).

27. *See Moffett v. Gene B. Glick Co.*, 621 F. Supp. 244, 284 (D. Ind. 1985). In *Nelson v. J.C. Penney Co.*, 75 F.3d 343, 347 (8th Cir. 1996), a manager of thirty years' service claimed an invasion of his privacy by a supervisor's opening his *locked* desk in his absence to obtain his personnel file. The Eighth Circuit Court of Appeals held it unlikely that the North Dakota Supreme Court would recognize a cause of action for this "type of intrusion." *See id.*

trusion. Note, for example, *Smyth v. Pillsbury Co.*,²⁸ in which a company that had given an express assurance that messages transmitted through the company's e-mail system would not be intercepted, did intercept a message to a supervisor from an employee on his home computer and discharged him for complaining of management in those messages.²⁹ The court dismissed the complaint, holding, *inter alia*, that even if the employee had a reasonable expectation of privacy in the communication, the interception was not "highly offensive" given the corporate interest in intercepting the communication.³⁰ Whether the result in the case is accurate or not, the analysis, in terms of the *Restatement*, is unimpeachable.

The inescapable conclusion is that what the law of intrusion actually regulates is not privacy, but outrage.³¹ The law protects freedom from emotional distress, not freedom of informational control.³²

Reading an employee's private mail, peeking into the restroom, or interrogating an employee in a locked room about the intimate details of her sex life are unlikely to serve any business purpose and would seem to cross all bounds of social tolerability. The need for a law protective of privacy is summoned not only for the occasional outrageous intrusion by a manager off on a frolic, but far more when an employer acts in a systematically invasive fashion in what it takes to be a legitimate business interest. A robust legal commitment to privacy would recognize that all the above predicate conditions are invasive—to be surveilled by a hidden camera wherever one sits, to have one's desk rifled for whatever is read, to be questioned about one's

28. 914 F. Supp. 97, 101 (E.D. Pa. 1996).

29. *See id.*

30. *See id.*

31. This is made quite explicit in some jurisdictions. *See* *Busby v. Truswal Sys. Corp.*, 551 So. 2d 322, 323 (Ala. 1989) (quoting *Cates v. Taylor*, 428 So. 2d 637, 639 (Ala. 1983) (quoting *Norris v. Moskin Stores, Inc.*, 132 So. 2d 321, 323 (1961))).

32. William Stuntz has addressed a parallel development in the application of the Fourth Amendment to non-police searches:

[I]n a series of cases involving searches by government officials other than police officers—principals searching students, government employers searching employees' offices, government regulators searching businesses—the Court has consistently declined to apply ordinary Fourth Amendment standards, adopting instead a kind of rational basis scrutiny that holds the (non-police) search legal unless it was outrageous. This too flies in the face of privacy protection, since one's privacy interest does not depend on whether one is being searched by a police officer or a school principal. Any other result, however, would embroil the Court in constitutional regulation of a wide range of government activities, regulation that might look suspiciously *Lochner*-like.

William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 445 (1995) (footnotes omitted). For more on the historical understanding of the Fourth Amendment on point, see also William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016 (1995).

private affairs however seemingly trivial—and it would then require a showing of a specific business need sufficient to overcome that intrusion, which condition may or may not have been satisfied in these cases. But such is not the law.

These threads come together in three areas of expanding technology: genetic, drug, and psychological testing.

1. Genetic Testing

Medical screening of applicants and employees took root in the second decade of this century largely in response to the passage of workers' compensation laws, to screen out those whose medical conditions might be exacerbated on the job, or who were possibly predisposed to disease or injury.³³ Not uncommonly, medical screening included the taking of a family medical history that might suggest hereditary traits for which an applicant could be excluded.

Today, over a third of a sample of Fortune 500 companies use medical records in making employment decisions.³⁴ Federal and cognate state laws regulate the use of medical screening, but only insofar as specially protected classes may be involved—of race or ethnicity, or more broadly, the statutorily disabled. However, unless the condition revealed by a medical test is particular to a protected class or constitutes a statutory disability, nothing in federal or most state laws would prohibit an employer from requiring and acting upon the results of such a test.

With the development of sophisticated genetic techniques, it is possible for an employer to include a genetic test as part of its screening procedures, as some, albeit as yet small number, do.³⁵ Where the results of a genetic screening test impinge upon a statutorily protected class or reveal a statutory disability, federal law or cognate state law regulates the employer's ability to disqualify applicants by reliance on those results. But the interest here is neither race, ethnicity, nor disability, but privacy. Nothing in our common law concept of privacy would reach genetic screening because the common law concept of

33. See generally Angela Nugent, *Fit For Work: The Introduction of Physical Examinations in Industry*, 57 BULL. HIST. OF MED. 578 (1983).

34. See DAVID F. LINOWES, A RESEARCH SURVEY OF PRIVACY IN THE WORKPLACE 15 (1996) [hereinafter LINOWES, RESEARCH SURVEY].

35. See generally OFFICE OF TECHNOLOGY ASSESSMENT, GENETIC MONITORING AND SCREENING IN THE WORKPLACE (1990). See also ELAINE DRAPER, RISKY BUSINESS: GENETIC TESTING AND EXCLUSIONARY PRACTICES IN THE HAZARDOUS WORKPLACE (1991), and Larry Gostin, *Genetic Discrimination: The Use of Genetically Based Diagnostic and Prognostic Tests by Employers and Insurers*, 17 AM. J.L. & MED. 109 (1991).

privacy would render this intrusion either not within any reasonable expectation or not highly offensive. The very ubiquitousness of medical testing—by employers, insurance companies, schools, and the military—would be taken to indicate a diminished if not nonexistent expectation of privacy. Genetic testing is arguably “no more intrusive than” any other medical test run on the same blood sample. The information collected is far more sophisticated, but arguably “only slightly more intrusive than” what might have been secured by a sufficiently elaborate family medical history. Accordingly, nothing in the law of most states³⁶ would prohibit the refusal to hire persons who conscientiously object to the test on the ground that it is an invasion of their privacy—that their genetic make-up was none of the employer’s business.

2. Drug Testing

A concomitant of the War on Drugs has been the enormous growth in the testing of applicants and incumbent employees for the presence of metabolites of certain controlled substances, especially marijuana and cocaine. Employers have done so in some cases because of a legal obligation, as in the transportation industry, but do so more often because of concerns for safety and efficiency (impaired performance, accident, and insurance costs attributable to drug use, or increased theft or drug trafficking on the premises). Employee drug testing is also done for improved morale associated with working in a “drug free” workplace, and for larger social purposes—to bolster the corporate image in the community or to set a standard of moral behavior.

Unlike medical screening, drug screening has triggered litigation based on privacy grounds (or cognate claims of public policy). Fifteen states have regulated workplace drug testing primarily to assure the accuracy of test results.³⁷ Though Montana³⁸ limits applicant screening to safety sensitive jobs, only Iowa³⁹ and Vermont⁴⁰ otherwise limit the screening of applicants and then only to insure that it is done as

36. Seven states prohibit the use of genetic screening for employment: IOWA CODE ANN. § 729.6(6A) (West 1993); N.H. REV. STAT. ANN. ch. 141-H:1-H:6 (1996); Genetic Privacy Act, 1996 N.J. Laws 126; N.Y. EXEC. LAW § 296 (McKinney Supp. 1997); OR. REV. STAT. § 659.227 (1993); R.I. GEN. LAWS §§ 28-6.7-2, 28-6.7-3 (1995); WIS. STAT. ANN. § 111.372 (West 1995 Supp.).

37. The statutes are reproduced in MATTHEW W. FINKIN, *PRIVACY IN EMPLOYMENT LAW* 252-321 (1995).

38. See MONT. CODE ANN. § 39-2-304(1)(b) (1993).

39. See IOWA CODE ANN. § 730.5(2) (West 1993).

40. See VT. STAT. ANN. tit. 21, § 512 (1987).

part of a pre-employment medical examination, presumably on the then lessened expectation of privacy. The supreme courts of three states have limited drug screening to safety sensitive positions.⁴¹ But for the most part, a drug test is considered more intrusive than any other medical test.⁴²

The Sixth Circuit Court of Appeals had a different view, but not one any more respectful of privacy. It concluded that urine testing did represent "an intrusion that a reasonable person might find objectionable."⁴³ But, it opined, the intrusion had to be based upon a matter the employee "had a right to keep private," and the metabolites in one's system were not such a matter.⁴⁴

The Oklahoma Supreme Court in *Gilmore v. Enogex, Inc.* addressed more fully the employer's right to know.⁴⁵ Robert Gilmore, an electrical engineer, had been employed for several years by Mustang Fuel.⁴⁶ Mustang was acquired by Enogex. Mustang had no policy on drug testing. Enogex had a random drug testing program. Gilmore was randomly selected and ordered to submit. He refused on the ground that submission would violate his privacy. He was fired.⁴⁷ After his discharge, he voluntarily submitted to the drug test (at the same hospital) which proved negative for illegal drugs or alcohol, but to no avail:

Employers have a legitimate interest in maintaining a work force free from the adverse effects of illegal drug and alcohol abuse. Safety issues and other concerns for efficiency prompted Enogex to take steps to ensure that its employees are neither intoxicated on the job nor performing under par because of off-duty drug and alcohol abuse. The means employed by Enogex drug-testing policy, though perhaps intrusive, appear reasonably calculated to ensure this legitimate end.⁴⁸

41. See *Webster v. Motorola, Inc.*, 637 N.E.2d 203, 208 (Mass. 1994) following *Folmsbee v. Tech Tool Grinding & Supply, Inc.*, 630 N.E.2d 586, 589-90 (Mass. 1994); *Hennessey v. Coastal Eagle Point Oil Co.*, 609 A.2d 11, 21 (N.J. 1992); *Twigg v. Hercules Corp.*, 406 S.E.2d 52, 55-56 (W. Va. 1990).

42. A California court doubted that a drug test really was all that intrusive. In a reprise of the "no more intrusive than" analogy, it observed that an employer's drug test—required for the positions of legal writer and copy editor trainee—was "only slightly more intrusive" than its required medical examination. *Wilkinson v. Times Mirror Corp.*, 264 Cal. Rptr. 194, 204 (Cal. Ct. App. 1989).

43. *Baggs v. Eagle-Picher Indus., Inc.*, 957 F.2d 268, 274 (6th Cir. 1992).

44. *Id.* at 274. It concluded that an employer in Michigan was privileged to use "intrusive and even objectionable means to obtain employment-related information about an employee" including the presence of drug metabolites in his system. *Id.* at 275.

45. 878 P.2d 360 (Okla. 1994).

46. See *id.* at 326.

47. See *id.*

48. *Id.* at 364.

In sum, despite judicial reservations in a few states, and some concern for the humiliation inherent in a supervised donation of a urine specimen,⁴⁹ the prevailing view is reflected in the thinking of the *Gilmore* court. Note, however, that the concern for safety that ostensibly prompted the Company's testing program could have been addressed by limiting testing to safety sensitive jobs (as is the law in four states). The concern for efficiency could have been addressed by testing incumbent employees only on "reasonable suspicion" of drug use. A concern for absenteeism could have been addressed by regulating that conduct irrespective of what occasioned it. Alternatively, the employer might be required to prove a business need for random drug testing in nonsafety sensitive work, for example, by showing that it conducted a cost-benefit analysis of its use of random drug testing that actually justified it. No such evidentiary showing has been required, however, and the leading review of the literature has doubted that such showing could be made.⁵⁰

Mr. Gilmore, a mechanical engineer, lost his job not out of any concern that he was a threat to safety (he apparently was not in a safety-sensitive position), or even because he was performing inefficiently (he apparently performed satisfactorily for some years⁵¹), but because he conscientiously objected to being tested, on grounds of privacy. It is debatable whether or not the Company's policy actually conduced toward a drug free workplace; but the Company's policy certainly did insure a workforce resigned to the surrender of its privacy.⁵²

3. Psychological Testing

As employment moved from artisanal manufacture and service in small shops to large factories and mass employers, more systematic means were sought to sift applicants and to select the "right" em-

49. Cf. *Wilcher v. City of Wilmington*, 891 F. Supp. 993, 1001 (D. Del. 1995).

50. See NATIONAL RESEARCH COUNCIL/INSTITUTE OF MEDICINE, UNDER THE INFLUENCE: DRUGS AND THE AMERICAN WORK FORCE 226-27 (Jacques Normand et al. eds., 1994) [hereinafter NRC/IOM Drug Study].

51. In *Seta v. Reading Rock, Inc.*, 654 N.E.2d 1061 (Ohio Ct. App. 1995), an accountant of six years service, a recreational marijuana smoker, was discharged for failing a random drug test under a policy instituted three months before. The court held that the test did not invade the plaintiff's privacy on the ground that it was an attempt to create a safe working environment. See *id.* at 1067. The court addressed neither fact that the employee's job was not safety-sensitive nor the fact that in her years of prior service, during which she smoked marijuana on average ten times a month, she apparently had not given any cause for concern in that regard. See *id.*

52. See generally JOHN GILLIOM, SURVEILLANCE, PRIVACY, AND THE LAW: EMPLOYEE DRUG TESTING AND THE POLITICS OF SOCIAL CONTROL (1994).

ployee. A primitive effort was undertaken by the Frank Dry Goods Company of Fort Wayne, Indiana, in the early 1920s.⁵³ The Company noticed that some of the weekend salesgirls sold around one hundred dollars worth of goods on a Saturday while others sold from twenty-five dollars to fifty dollars. It conducted a survey and found that the "good" salespeople were needy, came from large working-class families, and had savings accounts.⁵⁴ The "poor" salespeople came from small families (many were only children), didn't really need the money, had no savings, and had taken the job over the opposition of their families.⁵⁵ Accordingly, the Company adopted a series of "test questions" to qualify for the job:

"Have you a Christmas savings account, or a checking account or a savings account at a local bank?"

"How many people are there in your family, and what are their occupations?"

"Why do you want this job?"

"How much does a family of three require a year in order to live comfortably in this town?"

"What does your family think of your coming to work here?"⁵⁶

The massive testing programs conducted in conjunction with conscription in two World Wars stimulated interest in the use of more scientific personnel tests. Ability and aptitude testing is now regulated at the federal level by the Civil Rights Act of 1964. Again, the purpose of the Act was to open job opportunities for members of the protected classes who might otherwise be frozen out of employment, or at least, more desirable employments by the use of these devices. Testing having that effect was to be permitted if conducted in accordance with a statutory standard of professional validation.

Testing has gone well beyond ability and aptitude, however, to attempt to reach a person's psychological make-up.⁵⁷ Some employers use personality inventory tests that ask a number of questions from which a profile is developed and measured against a scale of psychological traits. Some use projective tests like the Rorschach or Thematic Apperception Test that require a psychologist to engage with the subject and to evaluate her response. Some use more cheaply administered paper and pencil "honesty" tests that seek to predict the

53. See Frank H. Williams, *Selecting Best Type of Salespeople Easy with This Set of Test Questions*, DRY GOODS ECONOMIST, Apr. 21, 1923, at 15.

54. See *id.*

55. See *id.*

56. *Id.*

57. See WESTIN, *supra* note 3, at 133-157, 242-278. Rather early on Alan Westin scrutinized and criticized the use of these devices.

applicant's propensity to steal by analyzing her answers to ethical and other questions.

Only one privacy challenge to psychological testing has been mounted in the private sector. In *Soroka v. Dayton Hudson Corp.*,⁵⁸ the court reversed the denial of a preliminary injunction against the use of psychological screening tests for the job of security officer with Target Stores. The claim was based upon the privacy provision of the California Constitution, on the legal theory of intrusion.⁵⁹ It challenged the questions dealing with bodily functions and religious belief, such as: "I am very strongly attracted to members of my own sex" and "I believe in the second coming of Christ."⁶⁰ We should note that the examiner was no more interested in the applicant's sex or religious life than Frank Dry Goods was with the number of working siblings in the applicant's family. The questions are not asked because the employer is interested in learning those facts. They are asked because they arguably correlate with certain traits, and it is the trait, not the applicant's sex life or number of siblings, that the employer is interested in. Nevertheless, the California Court of Appeals held that only those questions that relate narrowly and specifically to the performance of the job could be asked, and remanded for trial on that basis. The case was later settled.

Soroka, seemingly a vindication of employee privacy, illustrates how narrow the idea of intrusion is even under a legal regime seemingly more generous than the common law. If the gravamen of the wrong is requiring an employee to answer certain intimate questions, it follows that privacy would not be implicated if the questions were non-intrusive. (Indeed, such was the reasoning in *Cort v. Bristol-Myers Co.*,⁶¹ the questionnaire case adverted to earlier.) This eludes the real privacy issue posed by a psychological assessment: It strips the "test subject"—note the dehumanization inherent in the language—psychologically naked. Unlike an interview, where one confronts a human being whom one can attempt to persuade as, presumably, an applicant could even at Frank Dry Goods in 1922, the individual is rendered helpless, depersonalized, transparent, an object of scientific scrutiny. As Allan Hanson put it:

Whether test results are positive or negative is, at this level, irrelevant. The point is that testing opens the self to scrutiny and investi-

58. 1 Cal. 2d 77 (Ct. App. 1991).

59. *See id.* at 82.

60. *Id.* at 80.

61. 431 N.E.2d 908 (Mass. 1982).

gation in ways that the self is powerless to control. So far as the areas of knowledge covered by the tests are concerned, this transforms the person from autonomous subject to passive object.⁶²

This might be justified by the special circumstances of a particular employment, for example, in aviation or atomic energy. But in almost all jurisdictions, so long as members of protected classes are not disproportionately disadvantaged, these devices may be used with impunity, irrespective of the want of professional validation for such use.

B. *Autonomy*

Set out below is a brief survey of the law governing employer control of employees. In a nutshell, absent a connection to anti-discrimination law or presence in one of the few jurisdictions with a statute expressly on point, employers are given virtually unfettered control over employee expression, association, and other behavior, on and off the job.

Dress and grooming. Employers have sought to regulate dress and grooming to insure good hygiene, neatness, and a "business like" atmosphere pleasing to customers and perhaps, coworkers as well. Dress rules have sometimes been exacting, as a 1928 survey of department store sales personnel revealed.⁶³ At times an employer's rules have become so detailed as virtually or actually to prescribe a uniform.

An employer may have to accommodate an employee's dress where it is an authentic expression of religious practice or belief,⁶⁴ but not otherwise. Thus, when a male employee sought to wear long hair "styled," as he put it, as "my personal projection or image in the development of my personality,"⁶⁵ the court was incredulous. The right of the corporation to create its corporate image was "an aspect of [its] managerial responsibility."⁶⁶

Expression. Employers have regulated employee expression from the tongue in which one speaks on the job⁶⁷ to outright prohibi-

62. F. ALLAN HANSON, *TESTING TESTING: SOCIAL CONSEQUENCES OF THE EXAMINED LIFE* 179 (1993).

63. See Gertrude H. Sykes, *Dress Regulations in New York Metropolitan Stores*, J. RETAILING, Jan. 1929, at 28.

64. See, e.g., *Kohli v. LOOC, Inc.*, 654 A.2d 922 (Md. Ct. Spec. App. 1995) (Sikh); *Gayle v. Human Rights Comm'n*, 578 N.E.2d 144, 149 (Ill. App. Ct. 1991) (Rastafarian).

65. *Fagan v. National Cash Register Co.*, 481 F.2d 1115, 1122 (D.C. Cir. 1973).

66. *Id.* at 1125.

67. See, e.g., *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993).

tion upon any speech at all.⁶⁸ The employee's ability to retaliate for particular utterances may be subject to legal constraint. Under the National Labor Relations Act, for example, an employer may not forbid employees from wearing union buttons, insignia, or messages of protest in noncustomer contact areas.⁶⁹ So, too, does religious freedom under Title VII require a reasonable accommodation to displays on one's person of religious profession or belief.⁷⁰ However, absent some such discrete enclave of exemption, the employer's power is plenary.

Note, for example, *Drake v. Cheyenne Newspapers, Inc.*⁷¹ The employer, a newspaper, insisted that two editors, managerial employees for purposes of the Labor Act, wear a button voicing opposition to an effort to unionize the paper's employees. The editors "in good conscience" felt they could not do this, and were fired for that refusal.

Under the Labor Act, a manager has no statutory right to display support for a union contrary to his employer's dictate and, therefore, discharge for doing so would not be an unfair labor practice. But this case was different: The editors were not discharged for expressions of pro-union sentiment; they were discharged for refusing to wear a button displaying an anti-union message.⁷²

To the court, the employer's order presented no issue of public policy.⁷³ Inasmuch as the editors' reticence was a matter of purely private concern, it is understandable that the court was reluctant to apply a doctrine grounded in the performance of some public function. That would not explain, however, why a person's reticence to be identified publicly as taking a partisan position on a contentious private issue would not be held to invade his privacy. A worker represented by a union has a right to refuse the union's insistence that he display a pro-union message;⁷⁴ neither may a unionized worker who refuses to pay union dues for activities unrelated to collective bargaining or contract administration be required to identify those subjects of union political or social expenditures to which she objects. We recog-

68. See DAVID MONTGOMERY, *THE FALL OF THE HOUSE OF LABOR* 152 (1987) (references omitted) ("A Massachusetts leather currier complained in 1878 that the men in his shop were 'not allowed to speak to each other though they work close together, on pain of instant discharge.'").

69. See, e.g., *Escanaba Paper Co.*, 314 N.L.R.B. No. 122 (1994).

70. See *Wilson v. United States West Comm.*, 58 F.3d 1337, 1342 (8th Cir. 1995).

71. 891 P.2d 80 (Wyo. 1995).

72. See *id.* at 81.

73. See *id.* at 82.

74. On the "right to remain silent" under the Labor Act, see *Dawson Construction*, 320 N.L.R.B. No. 23 (1995).

nize it as a constitutional right—in fact, a right of “privacy”—to maintain one’s silence on such subjects.⁷⁵ In that setting, we recognize that no one can be compelled to embrace a position not his own or even be compelled to divulge what one’s position is. But our common law of privacy includes no analogous freedom: an employer could require as a condition of employment that employees publicly display any message upon an issue of moment to it irrespective of the employee’s conscientiously held view in the matter (absent religious scruple)⁷⁶ or her desire not to be identified with any public position at all.

Fraternization. Some jurisdictions include marital status as a protected category and so employer retaliation for adulterous behavior presents an issue under anti-discrimination law.⁷⁷ California’s commitment to privacy has arguably been extended to limit employer prohibitions on sexual relationships with employees of competitors.⁷⁸ However, in most jurisdictions employers are free to restrict employees in their off-duty sexual behavior. Prohibitions on fraternizing with coworkers have been litigated; the employees have lost.⁷⁹ Employer prohibitions may be driven by a concern for liability for sexual harassment—or even violence when relationships sour.⁸⁰ In contemplating

75. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 241 & n.42 (1977). The right to remain silent was adverted to by Warren and Brandeis as an element of the Right to Privacy:

The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others. Under our system of government, he can never be compelled to express them (except when upon the witness-stand); and even if he has chosen to give them expression, he generally retains the power to fix the limits of the publicity which shall be given them.

Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198 (1890) (reference omitted).

76. Cf. *Bigelow v. Bullard*, 901 P.2d 630 (Nev. 1995), where an employee was dismissed for expressing sympathy for blacks in remarks to a coworker. Bullard was fired, the Supreme Court of Nevada opined, not for anything he *did* but for what he *was*, a person “sympathetic to African-Americans.” *Id.* at 635. And nothing in our law would prohibit discharge on that ground, for expressing social sympathies incongruent with a manager’s views. See *id.*

77. See, e.g., *Slohoda v. United Parcel Serv.*, 475 A.2d 618, 620 (N.J. Super. Ct. 1984).

78. See *Rulon-Miller v. International Bus. Mach. Corp.*, 208 Cal. Rptr. 524 (Cal. Ct. App. 1984).

79. See, e.g., *Jarema v. Olin Corp.*, 4 F.3d 426 (6th Cir. 1993); *Rodgers v. Flint Journal*, 779 F. Supp. 70 (E.D. Mich.), *aff’d*, 948 F.2d 1290 (6th Cir. 1991) (demotion); *Watkins v. United Parcel Serv., Inc.*, 797 F. Supp. 1349 (S.D. Miss. 1992), *aff’d*, 979 F.2d 1535 (5th Cir. 1992); *Ward v. Frito-Lay, Inc.*, 290 N.W.2d 536 (Wis. Ct. App. 1980); *Grzyb v. Evans*, 700 S.W.2d 399 (Ky. 1985). In *Trumbauer v. Group Health Coop.*, 635 F. Supp. 543, 549 (W.D. Wash. 1986), the discharge of an employee who had had an affair with his supervisor prior to his hire, and which affair had ended prior to his employment, was held to violate no public policy.

80. See, e.g., *Fenton v. Pritchard Corp.*, 926 F. Supp. 1437, 1447 (D. Kan. 1996).

how best to deal with these situations, however, the common assumption is of the employer's plenary power over off-duty activity.⁸¹

Association. If employer regulation of intimate personal relationship presents no privacy problem, neither would regulation of friendships or other forms of association, absent union or church affiliation or other sodalities accorded special protection.⁸² In one such case, where an employer's order to employees not to associate with a discharged store manager was challenged on privacy grounds, the court held that no jury could find the order "highly offensive" as required by the common law concept of intrusion.⁸³

Drinking and smoking. Employers commonly forbid drinking on the job and, more recently, prohibit smoking on the premises. But some employers have gone much further, and refuse to hire or retain employees who drink or smoke at all, in an effort to reduce medical insurance costs attendant to such behavior. Unlike many of the other invasions of individual autonomy, these policies have drawn the attention of politically influential groups, i.e., the tobacco and alcohol interests. Consequently, eighteen states now expressly forbid discrimination on the basis of off-premises use of tobacco; one forbids discrimination on the basis of off-premises use of tobacco or alcohol; and six forbid discrimination on the basis of off-premises use of any "lawful product."⁸⁴ Absent such legislation, however, nothing prohibits such employer commands.

Recreation. Colorado forbids discrimination by employers for engagement in "any lawful activity" off the employer's premises⁸⁵ and New York forbids discrimination for engagement in "legal recreation activities."⁸⁶ (Both are subject to statutory exceptions and limitations.) Employers are free in that regard elsewhere. Thus, engagement in activities that pose a risk of increased medical costs, such as

81. See, e.g., Kathleen M. Hallinan, *Invasion of Privacy or Protection Against Sexual Harassment: Co-Employee Dating and Employer Liability*, 26 COLUM. J.L. & SOC. PROBS. 435 (1993).

82. Under the Americans With Disabilities Act, discrimination or discharge due to having a "relationship or association" with a person with a "known disability" is made separately actionable. 42 U.S.C. § 1212(b)(4) (1994).

83. *Glasgow v. Sherwin-Williams Co.*, 901 F. Supp. 1185, 1193 (N.D. Mass. 1995). In *Bigelow v. Bullard*, 901 P.2d 630, 631-35 (Nev. 1995), an employee failed to state a cause of action for being discharged for his close association with a coworker who was discharged for expressing social sympathies unacceptable to management.

84. The statutes are compiled in FINKIN, *supra* note 37, at 322-39.

85. COLO. REV. STAT. § 24-34-402.5 (1993).

86. N.Y. LAB. LAW § 201-d(2) (McKinney Supp. 1996).

skydiving or even sun-bathing could be prohibited, just as employers have prohibited the private consumption of alcohol or tobacco.

Community service. Particular and very narrowly crafted statutory prohibitions may limit an employer's ability to discharge an employee who is engaged in specified service activities, such as a volunteer fireman or emergency medical technician. But absent such special protective legislation, religious, or union activity, employers are free to regulate in that regard.⁸⁷ As the Supreme Judicial Court of Massachusetts put it, the exception from the at-will rule accorded for discharges violative of "public policy" does not protect employees who perform "appropriate, socially desirable duties" from being subject to discharge without cause.⁸⁸

Charitable giving. Corporate employers often participate in charitable giving campaigns, for example, the United Way. They manifest their "good corporate citizenship" by encouraging their employees to contribute. Because the employer knows which employees have and have not contributed (and in what amounts), the situation is instinct with the possibility of pressure being placed upon the employee to contribute—varying from appeals to good citizenship and social suasion to outright coercion—even though the employee may have a conscientious objection to how the funds are expended or collected, or even to participate *per se*. Any such objection grounded in religious belief would trigger a duty reasonably to accommodate; however, absent religious objection or a statute on point, employers are free to require "voluntary" employee participation.⁸⁹

C. A Critical Summary

Before proceeding further, it would be helpful to summarize our common law of employee privacy. Let us start with the idea of intrusion. Recall the ingredients that combine into the judicial conception of privacy under that head: a particular invasive action that exceeds one's reasonable expectation of privacy *and* is highly objectionable to a reasonable person. Recall further that reasonable expectations rest upon business practice, that the presence of a business purpose is often dispositive of the legitimacy (technically the "inoffensiveness")

87. Thus it has been held that an employer may discharge an employee for serving as a volunteer at an AIDS clinic on his own time. See *Brunner v. Al Attar*, 786 S.W.2d 784, 785 (Tex. App. 1990). The decision antedates the employment provisions of the Americans With Disabilities Act, *supra* note 82.

88. *Wright v. Shriners Hosp. for Crippled Children*, 589 N.E.2d 1241, 1245 (Mass. 1992).

89. See *Ball v. United Parcel Serv., Inc.*, 602 A.2d 1176, 1179-80 (Md. 1992).

of the intrusion as a matter of law, and that the courts reason by analogy: one practice "only slightly more intrusive" than another, that serves some business end works no infringement.⁹⁰ It is hard to avoid the conclusion that the combination of these ingredients reduces the idea of a common law protective of employee privacy to an irrelevance insofar as systematically invasive action is taken in the name of what management perceives as a greater business good. And as technology and social science advance in tandem to open more effective means of control, the prior and seemingly "only slightly less intrusive" devices are readily analogized to deny the employee any legal protection against these new methods.

If employers have a right to know that an applicant is healthy, they have a right to know what is in her body; if they have a right to know what is in her body, they then have a right to know genetically how her body is made up. If they have a right to know her genetic make-up, they have a right to know her psychological make-up, and so on. Such is the state of the law. Where next? If laying one's psyche bare is justifiable, as conducing toward the efficient building of cooperative (and docile) work groups,⁹¹ then so would the deployment of devices to measure and shape employee attitudes using sophisticated social science techniques, e.g., surveys, interviews, and interactive groups.⁹² These are of benefit to employers by bringing problems to the fore, by fostering communication—or, rather, a special form of

90. See, e.g., *Stehney v. Perry*, 907 F. Supp. 806, 823 (D.N.J. 1995), *aff'd on other grounds*, 101 F.3d 925 (3d Cir. 1996), sustaining the use of a polygraph challenged on Fourth Amendment grounds reasoning that, "[t]he incidental contact involved in attaching polygraph equipment and the rather innocuous reading of heart rate, respiration and perspiration changes are hardly more intrusive than a dental examination." Nor is this manner of reasoning limited to the law of employment. Note the reasoning in *Dwyer v. American Express Co.*, 652 N.E.2d 1351, 1353 (Ill. App. 1995), in which holders of American Express cards challenged on privacy grounds the Company's policy of selling the names and shopping patterns of card holders to advertisers. The court held that no cause of action was stated, relying upon state law allowing the State to sell the names and addresses of licensed drivers and registered motor-vehicle owners. See *id.* at 1355-56. If the state itself made such commercial use of motor vehicle registration, American Express' commercial use of card purchases was presumably no more intrusive than that; and, because the state did so, card holders could not legally complain that their shopping patterns had been made a commodity.

91. As a participant-observer of the elaborate screening techniques used by a Japanese automobile manufacturer observed, "[p]re-employment screening functions as a gatekeeper and, by targeting a worker's attitude and value system, it may create a new level of management control on the shop floor." LAURIE GRAHAM, ON THE LINE AT SUBARU-ISUZU 19 (1995).

92. See generally Sanford M. Jacoby, *Employee Attitude Surveys in American Industry: An Historical Perspective* in HANDBOOK OF HEALTH CARE HUMAN RESOURCE MANAGEMENT, 73-82 (1990) [hereinafter Jacoby, *Employee Surveys*]; see also Sanford Jacoby, *Employee Attitude Testing at Sears, Roebuck and Company, 1938-1960*, 60 BUS. HIST. REV. 602 (1986). For how far such a system may go, see Joan Vogel, *Manufacturing Solidarity: Adventure Training for Managers*, 19 HOFSTRA L. REV. 657 (1991).

communication—and by keeping unions out.⁹³ None of the questionnaire or interview questions are of a particularly intimate nature; thus, it would be difficult to see how any claim could be made that submission to these questionnaires, individual interviews, and group interactions is violative of privacy in the current judicial usage. But the fact remains that the individual is made an object of scrutiny and of systematic manipulation in her thoughts and attitudes; indeed, the purpose of these measures is in good part to produce passivity as a “weapon in the struggle for control of the workplace.”⁹⁴

Turn from intrusion to autonomy, and observe the current state of affairs: An employee who is raped by her employer can claim a violation of her privacy;⁹⁵ an employee who is discharged for having been raped cannot.⁹⁶ An employer must accommodate the dreadlocks of a Rastafarian,⁹⁷ but not those of one for whom it is merely an expression of his “personality.”⁹⁸ An employer cannot discharge an AIDS victim, but it might be able to discharge one who seeks to help AIDS victims.⁹⁹ A possible sexual harasser cannot be discharged for having sought legal counsel in prosecution of her case, but the alleged harasser can be discharged for having sought legal counsel in defense of his.¹⁰⁰ A unionized employee can refuse to wear a pro-union button demanded by his statutory representative, because the law recognizes his freedom conscientiously to decline; but a manager cannot refuse to wear an anti-union button demanded by his employer because the law refuses to recognize his.¹⁰¹ Employees can be discharged for falling deeply in love (unless in New York or Colorado) and, in New York, only if they are willing publicly to characterize what for them may be the defining relationship of their lives as, legally, a “leisure-time activity.”¹⁰²

93. For the use of psychological testing for just that result, see Gregory M. Saltzman, *Job Applicant Screening by a Japanese Transplant: A Union-Avoidance Tactic*, 49 INDUS. & LAB. REL. REV. 88 (1995).

94. Jacoby, *Employee Surveys*, *supra* note 92, at 82.

95. See *Simon v. Morehouse Sch. of Med.*, 908 F. Supp. 959, 973 (N.D. Ga. 1995).

96. See *Green v. Bryant*, 887 F. Supp. 798, 801 (E.D. Pa. 1995).

97. See *Gayle v. Human Rights Comm'n*, 578 N.E.2d 144, 149 (Ill. App. Ct. 1991).

98. See *Fagan v. National Cash Register Co.*, 481 F.2d 1115, 1125 (D.C. Cir. 1973).

99. See *Brunner v. Al Attar*, 786 S.W.2d 784, 785-86 (Tex. App. 1990).

100. See *Erickson v. Marsh & McLennan Co.*, 569 A.2d 793, 803-04 (N.J. 1990).

101. See *Drake v. Cheyenne Newspapers*, 891 P.2d 80, 82 (Wyo. 1995).

102. Compare *Pasch v. Katz Media Corp.*, No. 94 Civ. 8554 (RRP), 1995 WL 469710, at *3-4 (S.D.N.Y. Aug. 8, 1995) with *State v. Wal-Mart Stores, Inc.*, 621 N.Y.S.2d 158, 160 (App. Div. 1995).

This, then, is the “eclectic blend”¹⁰³ about which Alan Westin concludes:

On the whole, what we have written into law and judicial decision, and what has *not* been put into law in the various areas of workplace privacy, is a solid, workable system that strikes the right balances between privacy and other social interests.¹⁰⁴

Can this be right?

II. THE SEARCH FOR VALUES

Westin points to the congruence of attitudes of employees and human resource managers revealed in survey data to indicate that, for the most part, business actually does accommodate the mainstream (or “privacy pragmatic”) concerns of the American public: ninety percent of employees—truly an extraordinary statistic—believe that their employers have never sought inappropriate personal information. Indeed, only eight percent believe their employer to have collected health or lifestyle information that should not be collected. Most employees and managers agree on the appropriateness or inappropriateness of job screening devices, e.g., that drug testing is acceptable, but that psychological testing is not. Most employees and managers agree that certain kinds of off-the-job behavior, such as recreational activities, smoking, and drinking, should not be controlled by the employers and are none of the employer’s business. Most also agree on the kind of on-the-job monitoring an employer should be allowed; for example, sixty percent of employees think that telephonic interception should be allowed in order to insure proper service to the public.

Accordingly, the legal conclusion Westin draws from these data rests upon three assumptions: First, that what employees perceive their employers as doing corresponds to what their employees actually do; second, that action perceived as invasive of privacy by both employees and managers, but which our law does not recognize as wrongful, is relatively rare, and need not occasion legal concern; third, and *per contra*, that a widespread practice that is not perceived as invasive in public opinion presents no genuine issue of privacy. Each should be taken in turn.

103. One has to recognize that any time a legislature or the courts carve out an exception to the at-will employment rule anomalies will result. Thus the existence of an anomaly may not alone be an especially powerful argument for rethinking the law. But all these various categories of separate solicitude share a common concern for privacy, and the extraordinary complexity in the developing law of specially protected classes or activities only underlines the want of protection for the common denominator.

104. Westin, *supra* note 1, at 283 (emphasis added).

The first assumption presents a question of fact: Are employee perceptions that their employers generally respect their right to privacy accurate? The survey questions asked in that regard had to do with data collection, about which additional survey data are available—not of employee perception but of employer practice. David Linowes' 1995 survey of eighty-four responding Fortune 500 companies, with over three million employees, found that about half do not inform employees of what data have been collected concerning them; thirty-eight percent do not even inform employees of the *types* of records they maintain on them; forty-four percent do not inform employees about how their records are used; and more than half do not disclose their policies governing disclosure.¹⁰⁵ Thus, the confidence reposed by employees in their employers may well be based upon ignorance of what and how information actually is collected and disclosed. Note, for example, that whereas ninety percent of employees believe that access should be afforded to supervisory evaluations resulting from telephone monitoring,¹⁰⁶ the same extraordinary number repose confidence in their employees' respect for their privacy, about seventy percent of the corporations Linowes surveyed do not allow employee access to supervisory records concerning them.¹⁰⁷

The second assumption is that the authentic but infrequent violations of privacy may produce an occasional and aberrational case but need not raise legal concern. Taken at face value, the proposition poses the question of just how widespread violations must be before legal concern should be triggered. An earlier survey of Fortune 500 companies revealed that only two percent inquired about (and arguably made use of) whether or not an applicant was a smoker.¹⁰⁸ This is congruent with Westin's more recent survey of employee and managerial opinion of the rightness (and wrongness) of such a policy.¹⁰⁹ Does this mean that we need not be concerned about the fact that, absent legislation, the law concedes employers the privilege to inquire into smoking behavior and to forbid its off-duty consumption? A significant number of state legislatures have acted on that concern, apparently because the tobacco (and alcohol) interests thought the potential

105. See LINOWES, RESEARCH SURVEY, *supra* note 34, at 11-12.

106. See Westin, *supra* note 1, at 281.

107. See LINOWES, RESEARCH SURVEY, *supra* note 34, at 3, 9.

108. See DAVID F. LINOWES, PRIVACY IN AMERICA 50-51 (1989).

109. Westin, *supra* note 1.

numbers of consumers involved were more than *de minimis*.¹¹⁰ Note, however, that about seventy percent of both employees and managers believe that psychological tests should not be used in personnel selection and, consistent with that figure, twenty-eight percent of Fortune 500 companies surveyed *do* use these devices.¹¹¹ Presumably for want of an effective lobby, no state statute forbids or regulates such use. Does not the far more widespread nature of a practice condemned by substantial majorities of both workers and managers call for legal change? If not here, where?

It remains to be seen, however, whether it pays to think the way this assumption invites. The fact is that the law does concern itself with wrongful, but rare, aberrational managerial actions. The restroom voyeur, the prurient interviewer, and the reader of personal mail are of concern to the common law of privacy despite what one would expect to be the decided infrequency of the conduct involved.¹¹² (These cases can be put to one side only when one recognizes that the interest protected is not privacy, but emotional security. When that is done, however, virtually nothing is left that the law of privacy protects.) Accordingly, even if the cases on employee expression, appearance, association, charitable giving, and off-duty conduct surveyed earlier reflect only aberrant employers, they also evidence the failure of our legal conception of employee privacy to contain any element of individual self-determination in matters Westin's survey data reveal are commonly agreed to be none of the employer's business.

The third assumption is the most interesting. It takes the apparent want of strong contemporary objection to mean that a seemingly invasive practice is really not violative of privacy at all. That may be so, but the argument, and the data supporting it, need to be handled with care. Drug testing is a good example. Most employees and managers seem to see little or no privacy problem in requiring submission: Linowes' survey found that eight-six percent of the Fortune 500 companies surveyed use drug tests—almost all for screening purposes.¹¹³

110. If one were crudely (and unscientifically) to extrapolate that two percent figure across a civilian labor market of over 125 million workers, the perceived abuse of employer power would potentially affect over two million people.

111. See LINOWES, RESEARCH SURVEY, *supra* note 34, at 21.

112. Even here it has been argued that the law should stay out. Compare Dennis P. Duffy, *Intentional Infliction of Emotional Distress and Employment at Will: The Case Against "Tortification" of Labor and Employment Law*, 74 B.U. L. REV. 387 (1994) with Mark P. Gergen, *A Grudging Defense of the Role of the Collateral Torts in Wrongful Termination Litigation*, 74 TEX. L. REV. 1693 (1996).

113. See LINOWES, RESEARCH SURVEY, *supra* note 34, at 17-18.

Westin's data show that seventy percent of employees supported the propriety of drug testing—eighty-nine percent in companies that conduct tests.¹¹⁴ The question is what these data really tell us.

Looked at a little more closely, we learn that public opinion is often based on ignorance about what drug testing actually tests and how it works. In one rigorous survey, about two-thirds of the public were unaware how long it takes for a drug to show up in a test.¹¹⁵ Fewer than one in three understood that one can be high on drugs and not test positive.¹¹⁶ About forty percent were unaware of cross-reactivity for over-the-counter medications.¹¹⁷

It seems that what the data really tell us is that most Americans, often proceeding in ignorance, are persuaded that “[i]f a person has nothing to hide, there is no reason to refuse to take a urine test” (66%), we all must do our part in “the war on drugs” (65%), and that the drug problem is so serious that discovering a drug user “is more important than a person’s right to privacy” (58%).¹¹⁸ These attitudes contrast with survey data of actual drug use among employees—not the hard core abusers often depicted in anti-drug ads who are not in the labor market. To take one study of nearly two million test results (from October 1990 through March 1992), about four percent tested positive for one or more illicit drugs, marijuana being the most commonly detected (about 2%).¹¹⁹ Population studies show the prevalence of drug use varying significantly by age, sex, industry, region, and job. The use of illicit substances, especially marijuana and cocaine, has been estimated to vary from five percent to ten percent among employed men—with the higher percentages in occupations such as entertainment and construction. These figures are not insubstantial. They indicate a significant problem, especially for employers employing younger men in certain jobs in certain industries in certain parts of the country. They may support the need for policies that curtail the right of privacy, but only so far as such legitimate business need requires. They scarcely seem to justify the apparent willingness on the part of more than half the population to jettison the right to privacy.

114. See Westin, *supra* note 1, at 275.

115. See ALBERT H. CANTRIL & SUSAN DAVIS CANTRIL, *LIVE AND LET LIVE: AMERICAN PUBLIC OPINION ABOUT PRIVACY AT HOME AND AT WORK* 33 (1994).

116. See *id.*

117. See *id.*

118. *Id.* at 36.

119. See NRC/IOM Drug Study, *supra* note 50, at 75.

Accordingly, it ought be remembered that, for the most part, “demands for *legal* protection of a right to privacy have traditionally been made by elite groups in society,”¹²⁰ that those most responsible for intrusions into privacy have been those very elites—“governments, journalists, employers, and social scientists”¹²¹—and that most people have tended generally to accept these intrusions.¹²² Thus, part of the explanation for how the public attitude has come about may lie in strenuous corporate (and government) efforts to shape public opinion, including the widespread use of the very martial metaphor for the sake of which many have been persuaded that drug testing is more important than the right to privacy. For example, in the past nine years, the nation’s media have donated over \$2.3 billion in time and advertising space to The Partnership for a Drug-Free America alone.¹²³ The drug testing industry consumes about \$1.2 billion per year¹²⁴ and is unlikely to be indifferent to its financial future. And no one speaks publicly for drug consumers—not, at least, since the passing of Timothy Leary.

Consequently, I do not think Westin’s taxonomy based upon these survey data advances analysis. The large group of variable opinion that Westin calls “privacy pragmatist”—in contradistinction to the twenty-five percent most consistently concerned (whom he would marginalize as “privacy fundamentalist”)—might with equal justice be called “privacy fatalist,” i.e., persons who are concerned about privacy and who accept its loss. Is it any wonder that people who have submitted to a drug test approve of it by a wider margin than those who have not? This suggests that surveys alone might not be an adequate or entirely reliable source from which to abstract a sense of our values.

A separate source is our history, to which courts and commentators have often turned for a deeper understanding of our values as a people. Americans were not born subject to corporate screening and control. To paraphrase Oliver Zunz, we were “made corporate.”¹²⁵

120. Alan Westin, *Entering the Era of Databank Regulation and How We Got There*, in OECD, *TEN POLICY ISSUES IN DATA PROTECTION AND PRIVACY* 95 (1976).

121. Edward Shils, *Privacy: Its Constitution and Vicissitudes*, 31 *LAW & CONTEMP. PROBS.* 280, 301 (1966).

122. *See id.* at 301-02.

123. *See Partnership For a Drug-Free America: Overview* (Partnership for a Drug Free Am., New York, N.Y.), May 1, 1996, at 1. It claims that a drop in drug usage is attributable to its efforts. *See* DIANA CHAPMAN WALSH ET AL., *THE PARTNERSHIP FOR A DRUG-FREE AMERICA* (A) 26 tbl. 5D (Harvard Bus. Sch. No. N9-594-028, 1993).

124. *See* NRC/IOM Drug Study, *supra* note 50, at 24 n.4.

125. OLIVIER ZUNZ, *MAKING AMERICA CORPORATE 1870-1920* (1990).

Citizens of the post-Revolutionary generation, zealous of their independence and equality, were suspicious of the accumulation of employer power posed by the advent of the factory.¹²⁶ In the 19th century, for example, craft workers successfully asserted the right to drink *on* the job as an aspect of manliness and equality with their employers.¹²⁷ As that pre-industrial right was eclipsed by the factory, by employer demands for discipline, punctuality, and productivity, craft workers nevertheless resisted efforts to assure their total abstinence from alcohol. As David Hackett observed of the antebellum temperance movement in Albany, New York:

Despite all the fanfare . . . the effort to control drinking by reestablishing the elite's parental control over their workers had little success. . . .

Support for temperance had more than one meaning. Advocates of the town's workingmen were not opposed to the principle of temperance but to the blatantly economic motives of the parental approach. Rather than attack the character of Albany's working men, these "Temperance Generals" were urged instead to demonstrate to their employees a respect for their human rights.¹²⁸

This demand for respect by the working class persisted into the third quarter of the century. As Brian Greenberg explains:

At least until the early 1870s, "social honor" in Albany was distributed in such a way that concern for the social position of workers was part of the community's consciousness. It was not yet accepted in Albany that workers were merely a factor of production. Nor were the city's industrialists, at this time, able to translate their economic power into political and social domination.¹²⁹

The growth of large scale corporate employment, accompanied by the deskilling of the traditional crafts and the later adoption of modern techniques of personnel management, made the employer's respect of worker privacy part of the larger "contested terrain"¹³⁰ for control of the workplace and workforce. The contest can be glimpsed

126. See generally 1 *THE PHILOSOPHY OF MANUFACTURERS: EARLY DEBATES OVER INDUSTRIALIZATION IN THE UNITED STATES* xxii-xxiii (Michael Brewster Folsom & Steven D. Lubar eds., 1982).

127. See HOWARD B. ROCK, *ARTISANS OF THE NEW REPUBLIC: THE TRADESMAN IN NEW YORK CITY IN THE AGE OF JEFFERSON* 296-97 (1979); CHARLES SELLERS, *THE MARKET REVOLUTION: JACKSONIAN AMERICA 1815-1846*, at 259-60 (1991); see, e.g., DAVID BENSMAN, *THE PRACTICE OF SOLIDARITY: AMERICAN HAT FINISHERS IN THE NINETEENTH CENTURY* 53 (1985) (recounting how hatters in 1886 struck to retain the right to drink on the job, and won).

128. DAVID G. HACKETT, *THE RUDE HAND OF INNOVATION: RELIGION AND SOCIAL ORDER IN ALBANY, NEW YORK 1652-1836*, at 120 (1991).

129. BRIAN GREENBERG, *WORKER AND COMMUNITY: RESPONSE TO INDUSTRIALIZATION IN A NINETEENTH-CENTURY AMERICAN CITY, ALBANY, NEW YORK, 1850-1884*, at 64 (1985).

130. Cf. RICHARD EDWARDS, *CONTESTED TERRAIN: THE TRANSFORMATION OF THE WORKPLACE IN THE TWENTIETH CENTURY* (1979).

in three areas that have already been touched upon: medical screening for employment; control of life off-the-job; and the regulation of dress on-the-job.

Medical Screening: As noted previously, medical screening was introduced after the turn of the century, often at the behest of industrial physicians, in response to workers' compensation laws and to improve the fitness of the workforce. Some physicians shared the opinion of Dr. Harlow Brooks, professor of clinical medicine at New York University and at Bellevue Hospital Medical College, that physicians should examine a worker "as a horse jockey looks at a horse" with no more concern for the subject than "the average horseman, stockman, or veterinarian."¹³¹ Other physicians, however, saw their role in broader terms. A survey of 170 industrial establishments conducted by the United States Public Health Service in 1918 summarized one of the many purposes served by medicine in industry to be "the encouragement of thrift, domesticity, morality, and sobriety."¹³² Many employers heeded the call. A 1920 survey of fifty-six responding companies revealed that twenty-two did not require physical examinations and thirty-four—in fifteen industries employing a total of over 400,000 workers—did.¹³³ It reported on the scope of examination—a physical inspection and, in a minority of cases, urinalysis, blood pressure, Wasserman and tuberculosis tests—and was at pains to note that "[o]bjection to physical examinations on the part of prospective or actual workers [was] negligible."¹³⁴ It does not appear, however, that the workers were asked.¹³⁵

In fact, workers did protest. Workers feared for their jobs if found unfit.¹³⁶ They resented the loss of privacy,¹³⁷ and feared black-

131. Angela Nugent, *Fit For Work: The Introduction of Physical Examinations in Industry*, 57 BULL. HIST. OF MED. 578, 588-89 (1983).

132. C.D. SELBY, STUDIES OF THE MEDICAL AND SURGICAL CARE OF INDUSTRIAL WORKERS 14 (U.S. Pub. Health Service Public Health Bull. No. 99, 1919).

133. See F.L. Rector, M.D., *Physical Examination of Industrial Workers*, 75 SOC. MED. & MED. ECON. 1739 (1920).

134. *Id.* at 1741.

135. Interestingly, the survey reported that one company, a textile mill, discontinued physical examinations shortly after it was introduced due to "labor reasons." *Id.* at 1739.

136. See, e.g., Alan Derickson, "On the Dump Heap": *Employee Medical Screening in the Tri-State Zinc-Lead Industry, 1924-1932*, 62 BUS. HIST. REV. 656, 673-74 (1988).

137. See, e.g., Samuel Gompers, *Wages and Health*, 21 AM. FEDERATIONIST 642, 643-44 (1914). This formed one of the grounds of the opposition of the International Seamen's Union to being required to submit to screening for venereal disease in 1922. See PROC. OF THE TWENTY-FIFTH ANN. CONVENTION OF THE INT'L SEAMEN'S UNION [ISU] OF AM. 150-52 (1922). Shipping employers had imposed venereal disease screening even though a maritime employer's obligation of maintenance and cure did not extend to venereal disease. See *The Alector*, 263 F. 1007, 1008 (E.D. Va. 1920). Interestingly, testing for venereal disease was strongly urged at the

listing for having the temerity to protest.¹³⁸ These fears were not unfounded.¹³⁹ Sometimes they did more than protest verbally;¹⁴⁰ but, ultimately, to no avail. The contemporary consequence has been explained by Angela Nugent:

Medical examinations in industry gave American corporations access to the previously private "inner environment" of workers' bodies in an age when workers did not have the right to such information themselves or to complementary knowledge about the hazards of the environments in which they labored. Medical information became a component of management strategy, to be used benevolently or exploitatively, but in ways managers and company doctors determined.¹⁴¹

In 1914, trade unions asked their federation to take a stand on whether workers should submit to physical examinations at all and, if so, to decide "just how far the examination shall go"—whether it will be a cursory examination of eyesight and hearing or one "into the genealogy of the family three generations back."¹⁴² Technology has rendered the latter protest obsolescent. Today, the employee's "inner space," her genetic and psychological make-up, are open to employer inspection.

Private Life: When the Waltham style mills, the prototypical American factory, started in the mid-nineteenth century, the mills recruited young women from the farms of New England with the express assurance to anxious parents that the factory owners would exercise parental control. The "operatives" were regulated in their religious observances, commercial and recreational activities. As David Zonderman observed:

Some owners used the threat of dismissal to enforce their moral code in and out of the factory. Amasa Sprague ordered his employ-

time either as related to fitness for work or as an expression of moral opprobrium—as part of a crusade against sexually transmitted disease that shares certain parallel with today's "war on drugs." See generally, ALLAN M. BRANDT, *NO MAGIC BULLET: A SOCIAL HISTORY OF VENEREAL DISEASE IN THE UNITED STATES SINCE 1880* (1985).

138. See REP. OF PROC. OF THE THIRTY-FOURTH ANN. CONVENTION OF THE AM. FED'N OF LAB. 324 (1914). The ISU's Committee on Legislation adverted to medical screening conducted previously in Great Britain and observed that "[i]t was a notorious fact that the examination was used frequently for the purpose of blacklisting such men as protested against it." PROC. OF THE TWENTY-FIFTH ANN. CONVENTION OF THE ISU OF AM., *supra* note 137, at 151.

139. See ALAN DERICKSON, *WORKERS' HEALTH, WORKERS' DEMOCRACY: THE WESTERN MINERS' STRUGGLE, 1891-1925*, at 206-07 (1988).

140. See *id.* at 207 ("Workers objected to medical evaluations as an invasion of personal privacy. In 1919 the Mine-Mill local at ASARCO's plant in Pueblo, Colorado, struck to put an end to a procedure it considered 'only a humiliating farce.' Anaconda refused to adopt pre-employment examinations for this reason.")

141. Nugent, *supra* note 131, at 595.

142. PROC. OF THE THIRTY-FOURTH ANN. CONVENTION OF THE AFL, *supra* note 138, at 466.

ees to stay out of Nicholas Gordon's store, where workers were reported to be drinking during the day, or risk being fired. Some operatives said that they were afraid to buy even a needle and thread in that store for fear of being reported and dismissed. . . . [A] mill in Waltham posted a notice during the 1830s that any young woman who attended dancing school would be discharged. The overseer argued that if the operatives spent part of their evenings running about, they would become either ill or too tired on the job.¹⁴³

At the same time, however, male craft workers drew upon the pride of their skills, their independence from authority, and the regnant spirit of "manliness" to exercise considerable independence from authority. "Few words engaged more popularity in the nineteenth century," David Montgomery observes, "than this honorific, with all its connotations of dignity, respectability, defiant egalitarianism, and patriarchal male supremacy."¹⁴⁴

As the century wore on and craft jobs were displaced by semi-skilled operatives who were often foreign born, employers embarked upon programs to "Americanize" and "uplift" their workforces, to instill loyalty and docility, i.e., to keep unions out.¹⁴⁵

Some employer regulations, especially those connected to corporate welfare plans such as Ford's famous five dollar a day plan, could reach far into private life: housing, consumption patterns, personal hygiene, and the like. Southern textile mills in the late teens and early 1920s checked to see that their workers were abed at night, that women didn't smoke, that men didn't drink, that domestic relations were placid, and that the workforce was church going; indeed, the company supported churches that sermonized on the acceptance of the social and economic order.¹⁴⁶

These efforts often met with resistance and hostility. Textile workers protested by worshipping in nonmill churches, or by attending disapproved denominations.¹⁴⁷ Jean Hoskins, the "service secretary" of a Maine manufacturing company recalled her mission of "social up-

143. DAVID A. ZONDERMAN, *ASPIRATIONS AND ANXIETIES: NEW ENGLAND WORKERS AND THE MECHANIZED FACTORY SYSTEM 1815-1850*, at 150 (1992).

144. DAVID MONTGOMERY, *WORKERS' CONTROL IN AMERICA: STUDIES IN THE HISTORY OF WORK, TECHNOLOGY, AND LABOR STRUGGLE* 13 (1979).

145. See, e.g., GERALD ZAHAVI, *WORKERS, MANAGERS, AND WELFARE CAPITALISM: THE SHOEWORKERS AND TANNERS OF ENDICOTT JOHNSON, 1890-1950* (1988).

146. See JACQUELYN DOWD HALL ET AL., *LIKE A FAMILY: THE MAKING OF A SOUTHERN COTTON MILL WORLD* 123-26 (1987).

147. See *id.* at 178-79, 220-21.

lift" being greeted by the workers with "hard suspicious glances."¹⁴⁸ She recounted the occasion when "thirty angry girls descended on her office and declared that they were just as clean as she was and that they would not submit to physical examinations or take off their shoes and stockings for anyone."¹⁴⁹ Women who refused to submit to a routine investigation into their marital status by Ford's "sociology department" were immediately discharged.¹⁵⁰ A Miss Chadwick, who had been hired by Ford in 1918 as a stenographer, was dismissed some years later when "she insisted on her privacy."¹⁵¹ As Stuart Brandes has shown, employer efforts of this kind often cut against the grain of American values:

[E]mployees usually preferred to take charge of their own lives and found paternalism intrinsically demeaning. By regarding himself as a father to his employees and acting accordingly, an employer unavoidably relegated them to an inferior, childlike position.¹⁵²

Just as in the early post-Revolutionary period, when "fatherly mill masters could seem like 'monarch[s]'" to a people suspicious of authority,¹⁵³ many workers resisted quasi-parental corporate controls. Nevertheless, the corporate "family" metaphor continues widely to be employed today, and seemingly adult employees continue to be subject to quasi-parental controls on dating, association, recreation, and other similar activities.

Dress: A rich literature has developed on the relationship of dress to personal expression. To some employers, however, an employee's dress reflects upon the corporation—it is a matter of corporate image (and control), not personal autonomy. In some cases even

148. See STUART D. BRANDES, *AMERICAN WELFARE CAPITALISM, 1880-1940*, at 138-39 (1976).

149. *Id.* at 139.

150. See ZUNZ, *supra* note 125, at 144.

151. *Id.*

152. BRANDES, *supra* note 148, at 140-41. Brandes cites one study of the Pullman Company in the late 1890s that reported "concentrated hatred" against the employer for its regulation of life in what many at the time thought a model company town. See *id.* at 139.

153. JONATHAN PRUDE, *THE COMING OF INDUSTRIAL ORDER: TOWN AND FACTORY LIFE IN RURAL MASSACHUSETTES, 1810-1860*, at 119-20 (1983) (references omitted):

Yankees who heard mill managers repeatedly stress their "paternal scrutiny" of textile hands could also worry that manufactories harbored confections of executive power inappropriate in a nation dedicated to "liberty." This latter concern arose because, in the final analysis, paternalistic slogans surrounding factory order collided head on with another perspective: the widespread desire for a society peopled by citizens living in rough equality and independence and the correspondingly widespread fear of overbearing authority. They confronted, in sum, the "republican" ideology that had fueled the Revolution and that remained deeply influential during the early antebellum era. From a republican viewpoint, fatherly mill masters could seem like "monarch[s]," and to all the other complaints about manufactories could be added the charge that they were run like "tyrannies."

a uniform (or something close to it) has been required. At mid-century, however, recruits to New York's newly created police force refused to wear the prescribed blue coats "letting it be known that they were not liveried servants, but free Americans."¹⁵⁴ So, too, did railroad workers meet employer demands for grade-specific uniforms with "bitter derision and opposition."¹⁵⁵ The wearing of uniforms was "deemed degrading in a democratic society."¹⁵⁶ Even domestic servants protested the wearing of uniform dress at the turn of the century.¹⁵⁷ But by 1912, Walter Weyl observed with apparent nostalgia that it was "highly significant of the fierce egalitarianism of our *grand-fathers* that the wearing of a uniform, even by a railroad conductor, was hotly repelled as unworthy of a free-born American."¹⁵⁸

This is not to argue that dress and grooming are never of managerial concern: hygiene and safety may require the regulation of hair; flooring may not be able to tolerate stiletto heels. Even a uniform may serve important purposes, such as to enable swift identification of a company agent or, in some employments, to cater to critical consumer preferences: No doubt passengers would feel a bit queasy about boarding an airplane piloted by a captain dressed as a clown. But some dress restrictions strike their subjects as "intrusive, irrational, and irrelevant"¹⁵⁹—as serving no purpose other than as a manifestation of the employer's power.¹⁶⁰ Consequently, an office employee today who wishes to dress presentably but casually may be required to secure her employer's permission¹⁶¹—unless in the District of Colum-

154. DAVID MONTGOMERY, *CITIZEN WORKER: THE EXPERIENCE OF WORKERS IN THE UNITED STATES WITH DEMOCRACY AND THE FREE MARKET DURING THE NINETEENTH CENTURY* 67 (1993).

155. WALTER LICHT, *WORKING FOR THE RAILROAD: THE ORGANIZATION OF WORK IN THE NINETEENTH CENTURY* 271 (1983).

156. *Id.*

157. See DANIEL E. SUTHERLAND, *AMERICANS AND THEIR SERVANTS: DOMESTIC SERVICE IN THE UNITED STATES FROM 1800 TO 1920*, at 129-30 (1981) ("As late as 1901, Miss Mary Murphy, president of a Chicago servant girl union, voiced the 'prevailing sentiment' of her three hundred members when reassuring one woman of the union's position on uniforms: 'Wear uniforms? Nay, nay, Pauline; nay, nay.'"). Florence Nesho recalled of the uniform required of candy packers by Whitman's chocolates in the late 20s that it made her feel as if she were in a reform school. See JOHN BODNAR, *WORKERS' WORLD: KINSHIP, COMMUNITY, AND PROTEST IN AN INDUSTRIAL SOCIETY, 1900-1940*, at 19 (1982).

158. WALTER E. WEYL, *THE NEW DEMOCRACY: AN ESSAY ON CERTAIN POLITICAL AND ECONOMIC TENDENCIES IN THE UNITED STATES* 157 n.1 (Macmillan Co. 1912) (1964) (emphasis added).

159. KEVIN D. HENSON, *JUST A TEMP* 117 (1996).

160. See *id.* at 123 ("This loss of autonomy accentuates the sense of powerlessness that can be used by management to gain compliance, conformity, and control.")

161. Cf. *Lowe v. Angelo's Italian Foods, Inc.*, 87 F.3d 1170 (10th Cir. 1996) (no cause of action by female employee of restaurant, whose duties included purchasing and inventory con-

bia (where "appearance" is a protected category),¹⁶² or in California (and only for females who wish to wear pants)¹⁶³—which managerial discretion may be conditioned on the employee's making a charitable contribution and displaying a button signifying such, i.e., in return for her public demonstration of her loyalty to the corporation's manifestation of its good corporate citizenship.¹⁶⁴

* * *

The histories briefly surveyed have looked to the record of dissent, of protest, even of strife that welled up from ordinary people as America became corporate. They may reflect the sentiments of a statistical minority at any moment in time;¹⁶⁵ of that we cannot be sure, for we cannot know how many complied in quiet resignation. But they express a consistent theme of which at least this much can be said: From the second half of the nineteenth century and accelerating thereafter, corporate America strove to secure not only conformity to its power to control, but also acceptance of its right to control, its values.¹⁶⁶ It has largely succeeded in the former, but it has not succeeded

control, for being forbidden by her employer to wear the color red; as her boss put it, "[N]o more of this red thing.") *Id.* at 1172.

162. See D.C. CODE ANN. § 1-2512(a) (1992).

163. See CAL. GOV'T CODE § 12947.5 (West 1996 Supp.).

164. See, e.g., BULL. TO MGMT. (BNA) (May 30, 1996) at 175, reporting on United Cerebral Palsy's "Casual Day" program run in cooperation with the Society for Human Resource Management: "In exchange for a suggested minimum donation of \$5.00 to UCP, employees are permitted to come to work in casual clothes and receive a 'Casual Day' button signifying their participation in the event." Eleven thousand employers participated in the program in 1993.

165. Louis Galambos has written of the pivotal post World War I period that, "[A] new set of values was supplanting traditional norms. Americans were giving less emphasis to individualism . . . and becoming more tolerant of coercive controls . . ." LOUIS GALAMBOS, *THE PUBLIC IMAGE OF BIG BUSINESS IN AMERICA, 1880-1940*, at 261 (1975).

166. The literature on the history of corporate efforts to shape American public opinion in the critical inter-war years, when radicalism was rising, labor unrest was rampant, and corporate values not yet firmly fixed in the public mind, is extensive. One could note only for illustrative purposes the strenuous public anti-union campaign of the 20s, called the "American plan" for propagandistic purposes, see, e.g., IRVING BERNSTEIN, *THE LEAN YEARS: A HISTORY OF THE AMERICAN WORKER 1920-1933* (1960), or the effort to enlist the public schools to indoctrinate belief in the industrial order. See, e.g., 2 EDWARD A. KRUG, *THE SHAPING OF THE AMERICAN HIGH SCHOOL 1920-1941*, at 3-17 (1972). The vision of educational spokesmen of the period was for the schools to "equip each young citizen to function in a society whose touchstone would be orderly and efficient management." *Id.* at 3. A recent study observes of the process:

There was, of course, a fundamental contradiction in the twentieth-century industrial Americanizers' embrace of exclusivity and hierarchy in a nation that exalted the goals of political and social democracy. The Americanizers resolved this contradiction in part by endowing their particular vision of the just society with the spiritual vestments of, in their terms, the "civic and political religion of the United States." . . . The secular religion of corporate capitalism, in the view of the industrial Americanizers, guaranteed freedom through the social behavior of obedience to recognized authority. "Obedience," they intoned, "helps make men truly great."

JOHN C. HENNEN, *THE AMERICANIZATION OF WEST VIRGINIA: CREATING A MODERN INDUSTRIAL STATE 1916-1925*, at 148-49 (1996) (references omitted).

completely in the latter, as the cases reviewed earlier evidence. These cases, brought by ordinary people against all legal odds, suggest that the contest has moved from the workplace to the courthouse, and with as little prospect of success. But these cases are also evidence of a strong and continuous historical current in which ordinary people, not elites, have demanded respect for their individuality and their right of self-determination. Thus, it will not do to marginalize principled protest as an expression of some fringe fundamentalism.¹⁶⁷ When Carl Cort, a salesman of eleven years service, refused to divulge his marital status to his employer because it was none of the employer's business,¹⁶⁸ when Robert Gilmore, a mechanical engineer of seven years service, refused to submit to a random drug test because it was an invasion of his privacy,¹⁶⁹ and when Kerry Drake, an editor of twenty years service, refused to wear an anti-union button because he balked at being made a "billboard" for views not his own,¹⁷⁰ they drew from a deep wellspring in American values. What is surprising is that they did not prevail.

III. SHAPING THE LAW

How is it that a Nation conceived in liberty gives its workers, legally, so little of it? It is worth considering whether at least some of the explanation rests on two closely conjoined considerations: the continuing ideological power of *laissez-faire*; and the arrested development of the common law. The former assumes the illegitimacy of legal intervention. The latter has failed to supply the doctrinal grounds to question that assumption.

A. The "Whig Tradition"

"The employer is too often the autocrat in his own home," Lucy Salmon complained in a turn of the century polemic on the treatment

167. Cf. NEIL W. CHAMBERLAIN, *REMAKING AMERICAN VALUES: CHALLENGE TO A BUSINESS SOCIETY* 90 (1977):

Despite the organizational revolution and the technological momentum, we maintain a primary concern for the impact of these on the individual. We wrestle with the problem of how to make the individual significant *in* the organization. If the organization seems on the point of overpowering the individual, we look for ways . . . of bolstering the resistance power of the individual.

168. See *Cort v. Bristol-Meyers Co.*, 431 N.E.2d 908 (Mass. 1982).

169. See *Gilmore v. Enogex, Inc.*, 878 P.2d 360 (Okla. 1994).

170. See *Drake v. Cheyenne Newspapers, Inc.*, 891 P.2d 80 (Wyo. 1995). The account of Mr. Drake's objection is taken from the Brief of the Appellants: "Their objection . . . was to being used as billboards. They did not object to loyally stating management's position but they did not want to state management's position as though it was their personal position." Brief of Appellants at 4-5, *Drake v. Cheyenne Newspapers, Inc.*, 891 P.2d 80 (Wyo. 1995) (No. 94-133).

of domestic servants.¹⁷¹ “He considers that neither his neighbor nor the general public has anymore concern in the business relations existing between himself and his domestic employees than it has in the price he pays for a dinner service or in the color and cut of his coat.”¹⁷² And if the public has no valid interest in the master’s business relations with his domestic servants, neither could it of his business relations with any of his other employees. So powerful was business opposition to public intervention that in 1880, in Missouri, when many employers were imposing abstinence on their employees, employers resisted legislative efforts toward that very end “out of ideological opposition to any popular or governmental regulation of business.”¹⁷³

The freedom of employers from communal accountability was enshrined in the constitutionalization of economic due process—in a freedom of contract that blunted the ability of the legislatures to enact labor protective law. Although the legal doctrine has been abandoned, the ideology has not. As Seymour Martin Lipset has observed, the “Whig tradition,” the classic American belief in “laissez-faire, anti-statist, market-oriented” values continues to reign today,¹⁷⁴ which Westin’s survey data also confirm. In one survey conducted by the Office of Technology Assessment, about sixty percent of corporate health officers agreed that genetic screening posed a potential threat to the rights of employees; but sixty-two percent responded that the decision to perform genetic screening on job applicants should be the employer’s.¹⁷⁵

Consequently, liberty in the workplace is conceived in terms of the *employer’s* freedom, his freedom from state control in which the employee’s freedom from employer control, is at best, derivative; that is, if the employee does not like the employer’s intrusion or constraint she is free to quit and find one whose workplace is less intrusive or less constrained. Some courts have pursued that manner of thinking to a logical conclusion: an employee who refuses to consent to a test or a search and is discharged for that refusal cannot claim an invasion of privacy, there having been no intrusion, and an employee who sub-

171. See LUCY MAYNARD SALMON, *DOMESTIC SERVICE* 121-22 (2d ed. 1911).

172. *Id.*

173. DAVID THELEN, *PATHS OF RESISTANCE: TRADITION AND DIGNITY IN INDUSTRIALIZING MISSOURI* 153 (1986).

174. SEYMOUR MARTIN LIPSET, *AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD* 98 (1996).

175. See OFFICE OF TECHNOLOGY ASSESSMENT, *MEDICAL MONITORING AND SCREENING IN THE WORKPLACE: RESULTS OF A SURVEY*, Tbl. 4-3 at 37 (1991).

mits to the search or test can claim no intrusion by virtue of consent.¹⁷⁶

In other words, we tend to look to the market to chasten abuses of employer power. But, as the foregoing excursion evidences, much of the history of employee privacy is a history of inexorable erosion. As Edward Shils noted thirty years ago:

Intrusions into privacy have been so intertwined with the pursuit of objectives that are unimpugnable in our society, such as . . . industrial and administrative efficiency, that each extension of the front has been accepted as reasonable and useful. Each objective has appeared, to large sectors of the elites at the center of society, to be well served by the particular form of intrusion into personal privacy that their agents have chosen for the purpose.¹⁷⁷

When almost ninety percent of Fortune 500 companies (offering the better paying jobs) require submission to a drug test, and the conscientious objector, if she is to keep her scruples, may be relegated to a secondary labor market, consent to the test cannot be said to be free.¹⁷⁸

In this sense, Alan Westin is quite right when he speaks of our values being reflected in what the law does *not* protect. Not that we value privacy less, but we seem to value legal non-intervention more. Moreover, the declination to intervene has been abetted by our reliance on the law of torts to express our communal understanding of the interests involved, even as the development of that law has rendered it virtually irrelevant in this setting. Why the law of tort has been so resistant to growth is worth brief consideration.

B. The Common Law's Arrested Development

The conventional wisdom is that our common law understanding of privacy grew out of Warren and Brandeis' 1890 article, *The Right to Privacy*.¹⁷⁹ Drawing upon a variety of legal categories—defamation,

176. See, e.g., *Gretencord v. Ford Motor Co.*, 538 F. Supp. 331 (D. Kan. 1982) (submission to car search), and *Mr. B's Oil Co., v. Register*, 351 S.E.2d 533 (Ga. App. 1986) (submission to psychological stress evaluation test).

177. Shils, *supra* note 121, at 301.

178. Westin made much the same point apropos polygraph screening:

When applicants for corporate or government service, normally well qualified, well recommended, and with no trace of criminality to raise questions, must submit to polygraphing or forsake these key sources of employment in American economic life, then "consent" is far from free.

WESTIN, *supra* note 3, at 240. According to Linowes' survey, only 15% of reporting companies had used polygraph or truth verification devices. See DAVID F. LINOWES, *PRIVACY IN AMERICA: IS YOUR PRIVATE LIFE IN THE PUBLIC EYE?* 55 (1989). This use is now regulated under both federal and state law.

179. Warren & Brandeis, *supra* note 75.

property, implied contract, and copyright—and extensively referencing not only English, but also French law, they argued that a cohesive underlying principle tied these disparate elements together. Because their immediate concern was the activity of the “yellow press,” and because they had emphasized accordingly Judge Cooley’s reference to the right “to be let alone,” subsequent writing focused on the idea of intrusion into seclusion as that cohesive element. William Prosser drew that conclusion in a 1960 review that significantly influenced the development of the common law.¹⁸⁰

But, as Edward J. Bloustein pointed out in a reply to Prosser in 1964, the common interest Warren and Brandeis saw at work was not seclusion but a broader principle of “inviolate personality” which Bloustein took to mean “the individual’s independence, dignity and integrity,” that which defines “man’s essence as a unique self-determining being.”¹⁸¹ A fresh reading of *The Right to Privacy* supports Bloustein’s view; indeed, Warren and Brandeis reiterate the idea of one’s “personality” or “inviolate personality” as at the core of the protected interest.¹⁸² Warren and Brandeis wrote of intrusion, the “right to be let alone,” as a subset of the larger interest which, however, they did not further develop. In 1915, however, Roscoe Pound did.¹⁸³ He placed the “disputed right to privacy” just where Warren and Brandeis put it, as part of a larger framework of legal interests in individual personality.¹⁸⁴ Pound developed that framework with an eye, so to speak, on a well developed body of German legal theory, including the work of Karl Gareis with which Pound was especially familiar. And so it is briefly to that work we should turn.

In Pound’s Introduction to Karl Gareis’ *Introduction to the Science of Law*, Pound argued that American scholars could not afford to neglect Continental writers, that on the philosophical and historical approaches to law “and for unification with other social sciences which the sociological movement is demanding . . . we have to look to the ‘inevitable German.’”¹⁸⁵ Gareis, upon whom Pound relied

180. See William L. Prosser, *Privacy*, 48 CAL L. REV. 383 (1960).

181. Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 971 (1964). The Bloustein-Prosser conflict was reviewed critically by Hyman Gross, *The Concept of Privacy*, 42 N.Y.U. L. REV. 34 (1967), and Raymond Wacks, *The Poverty of “Privacy”*, 96 L.Q. REV. 73 (1980).

182. Warren & Brandeis, *supra* note 75, at 205, 207, 211.

183. See Roscoe Pound, *Interests of Personality*, 28 HARV. L. REV. 343 (1915) (Pt. 1), 445 (Pt. 2).

184. See *id.* at 362.

185. Roscoe Pound, *Introduction to KARL GAREIS, INTRODUCTION TO THE SCIENCE OF LAW* ix (Albert Kocourek trans., 1911).

(among others), had been a significant figure in sustaining the idea of a general right of personality in German legal theory against the attacks of German scholars of the Historical School.¹⁸⁶ Gareis explained that

The materials of what is called the law of personality are the interests which a legal subject has in his existence as a person and in his activity as such, and the recognition by law of this existence and activity. The legal advantage, to which protection is assigned, is an unimpeded activity and expression of personal individuality.¹⁸⁷

The legal concept of "personality," that one's very being as a person, one's recognition as an individual and one's freedom in all of life's activities were valid legal interests that could be asserted as a matter of private law, drew from deep roots in Western legal thought and had gone through considerable refinement in legal theory, though it had never become a functioning rule in German law and was even then criticized as too all encompassing to become one. Gareis acknowledged the protoplasmic potential of the theory but stood out (along with the more prominent figures of Gierke and Kohler) as a defender of the concept.

Prosser never mentioned Pound's article; he noted comparative law writing, but only for informational purposes. Thus he ignored the legal concept of "personality" employed by Warren and Brandeis in 1890 and developed more fully by Pound in 1915. More important, he declined to consider Continental law, either the "inevitable German" invoked by Pound or the body of French law from which Warren and Brandeis had drawn in fashioning the idea of a Right to Privacy. Instead, he turned inward, to the domestic caselaw, and argued that what was thought of as privacy by American courts was actually four separate torts; these were later codified under his direction in the *Restatement (Second) of Torts*: (1) intrusion into seclusion; (2) appropriation of name or likeness; (3) publicity given to a matter of private life; and, (4) publicity in a false light.

186. See generally DIETER LEUZE, DIE ENTWICKLUNG DES PERSÖNLICHKEITSRECHTS IM 19. JAHRHUNDERT (1962). The leading critic was Friedrich Carl von Savigny. He ridiculed the very idea, accepted by some "that men had so broad a right of property in their mental powers as to derive a freedom of thought from it." ["Manche sind in dieser Ansicht so weit gegangen, dem Menschen ein Eigentumsrecht an seinen Geisteskräften zuzuschreiben, und daraus das was man Denkfreiheit nennt abzuleiten . . ."], and pointed out that the logical conclusion of so all encompassing a view of individual self-determination which a person could assert against all possible injuries lead to the reprehensible acknowledgment of a right to suicide. 1 FRIEDRICH CARL VON SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS, 335-36 (1840).

187. GAREIS, *supra* note 185, at 122.

The *Restatement's* inward gaze was in keeping with a document intended only to summarize American law as it was, not to shape the future or to launch into novel (and arguably questionable)¹⁸⁸ foreign borrowings. The problem, however, lay in "restating" a body of law that was even then in the process of change and subject to sharp theoretical dispute, as Bloustein's exchange with Prosser evidenced.

In 1902, for example, the New York Court of Appeals scoffed at the very idea of a legal right to privacy in a case of commercial appropriation of the plaintiff's likeness, on the ground that the concept could not logically be cabined, that it would result in "a vast amount of litigation . . . bordering on the absurd."¹⁸⁹ But by 1939, the first *Restatement* recognized "privacy" as an interest in not having one's "affairs known to others" or one's "likeness exhibited to the public."¹⁹⁰ The subsequent expansion of the categories in the 60s and 70s must have been understood as acknowledging that the law was in a state of growth. Indeed, the *Restatement (Second)* acknowledged that other forms of privacy might emerge, that it was not "intended to exclude the possibility of future developments in the tort law of privacy."¹⁹¹ But it has had precisely that effect. The categories have become canonical. In court after court, if what is presented is not one of the litany of four, it is not privacy. Thus, the discharge of an employee over dress, fraternization, expression, association, recreation, and the like, being a matter of only private concern is held to raise no issue of public policy; and, as it falls under none of the four conventional heads, neither is it of the slightest concern to the law of privacy.

The irony is that the American parochialism that culminated in the second *Restatement* came at a time when the general right of employee personality had been vitalized by the German courts,¹⁹² abstracted in part from the constitutional guarantee of the right of each person to the "free development of personality."¹⁹³ This and other

188. It bears reiteration that by the 30s, the idea of a general right of personality had been "more or less discredited" in German legal thought. See Gutteridge, *The Comparative Law of the Right to Privacy*, 47 L.Q. REV. 203, 205 (1931). Thus, before the early 1960s, it would not have been profitable to have looked to German law, though the Swiss Code expressly incorporated the concept. See *id.* at 211-15. But it was in the 60s and 70s when the modern idea of privacy in American tort law took shape that the German theory was revitalized and given a considerable judicial texture. Comprehensive and critical appraisals were available at the time. See, e.g., ROLF BIRK, *DIE ARBEITRECHTLICHE LEITUNGSMACHT* 305-49 (1973).

189. *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 545 (1902).

190. RESTATEMENT OF TORTS § 867 (1939).

191. RESTATEMENT (SECOND) OF TORTS § 652A at 377 (1977).

192. See generally, BASIL MARKESENIS, *A COMPARATIVE INTRODUCTION TO THE GERMAN LAW OF TORTS* 55-58 (2d ed. 1990).

193. Basic Law of the Federal Republic of Germany Art. II(1).

civil liberties were adopted, and much of the law of employment was developed, in response to workplace law and practice under National Socialism: where workers were required to attend plant rallies, to use the "German greeting" (hand raised to specified level and an audible "Heil Hitler," if possible), and to contribute to the party's Winter Relief charitable campaign as conditions of private employment; where workers were subject to workplace surveillance (the Gestapo having offices in some plants) not only for political correctness but for "slacking" and offenses against plant rules as well; where insubordination, slow work or absenteeism could lead to a "work education camp," or worse; where any act of nonconformity was potentially subversive.¹⁹⁴ But not all was coercion. The party Labor Front's office, "Beauty of Work" (*Schönheit der Arbeit*), assured hot meals in the plant of better quality than could otherwise be obtained and more cheaply, the Labor Front's office "Strength Through Joy" (*Kraft durch Freude*), provided inexpensive vacations and other leisure time activities to which the working class had never been accustomed, and a system of "courts of social honor" were instituted in part to protect employees from abusive supervision. The amalgam of inducements and constraints did tend generally to pacify the working class and, for some true believers, the benefits along with the rallies, salutes, slogans, and uniforms (sought by the party's Labor Front activists as a sign of status in a uniform-conscious society) did create the sought-for sense of community.

In sum, modern German courts were well aware of the impact of total institutions and sought to secure adequate breathing space for expressions of individuality and autonomy even in an employment relationship. They did so by breathing active life into the legal idea of a general right of "personality" which includes an encompassing concept of privacy.¹⁹⁵

194. See generally, IAN KERSHAW, POPULAR OPINION AND POLITICAL DISSENT IN THE THIRD REICH: BAVARIA, 1933-1945 (1983); ANDREAS KRANIG, LOCKUNG UND ZWANG: ZUR ARBEIT-SVERFASSUNG IM DRITTEN REICH (1983); TIM MASON, SOCIAL POLICY IN THE THIRD REICH (Joan Broadwin trans. 1993); DETLEV PEUKERT, INSIDE NAZI GERMANY: CONFORMITY, OPERATION, AND RACISM IN EVERYDAY LIFE (1987); WOLFGANG SPOHN, BETRIEBSGEMEINSCHAFT UND VOLKSGEMEINSCHAFT: DIE RECHTLICHE UND INSTITUTIONELLE REGELUNG DER ARBEIT-SBEZIEHUNGEN IM NS-StAAT (1987). For a more popular account, see RICHARD GRUNBERGER, THE 12-YEAR REICH: A SOCIAL HISTORY OF NAZI GERMANY 1933-1945 (1971).

195. See 2 KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 341 (Tony Weir trans., 1977):

[P]rivate law must protect a man's personality not only where it is indirectly infringed in its physical manifestations but also where it is attacked directly by outrages against his honour, by the publication of his private affairs, by the unauthorised recording of his confidential utterances or suchlike unpermitted trespasses into the area of his pri-

What this has come to mean in practical terms is succinctly summarized in a standard text in labor law:

The right of personality is defined as a "right to be respected as a person, not to have one's individuality infringed, in one's right to express oneself (in appearance, writing, and speech), in one's social standing (honor), and in the private and intimate areas of one's existence."¹⁹⁶

When any of these areas are infringed by employer action, a balancing test is employed to weigh the intrusion or constraint against the business necessity claimed to justify it. So, for example, the screening of employees for medical conditions that are relevant to the job or needful for the protection of others is permitted; but, questions about diseases long past or "about the diseases of relatives" may not be asked.¹⁹⁷ Interview questions or questionnaires for which a sufficient showing of job relatedness can be made are allowable, but not otherwise. So, for example, an employer can inquire of an applicant's remuneration in her current job only if it is important to the position applied for or if the applicant claims it as a minimum for the new position.¹⁹⁸ Comprehensive personality inventory tests are prohibited; other psychological tests require a specific showing of job relatedness.¹⁹⁹ Employer restrictions on dress, speech, and even aspects of the enjoyment of life on the job (such as playing a radio in a non-public area) are subject to a similar showing of business necessity, and, suffice it to say, controls of private life are almost totally forbidden.

It is here worth contrasting the American idea of intrusion into privacy arguably worked by a personality test with the German con-

vacy. German lawyers here speak of 'invasions of the right of personality' (*Verletzungen des Persönlichkeitsrechts*).

196. GÜNTER SCHAUB, *ARBEITSRECHTS-HANDBUCH* 1293 (8th ed. 1996) (reference omitted). The translation here as elsewhere in this lecture is not literal; it is intended to convey the sense of the statement. I am indebted to my colleague (and fellow Humboldtian) Harry Krause for care of my German, but errors necessarily remain mine. The text reads:

Das Persönlichkeitsrecht wird definiert als ein „Recht auf Achtung, auf Nichtverletzung der Person (Individualsphäre), und zwar in ihren unmittelbaren Äußerungen (Erscheinungsbild, Schrift, Rede), ihrer sozialen Geltung (Ehre) und ihrem ihr unmittelbar zugehörigen Daseinsbereich (Privat- und Intimssphäre).

The separation of "spheres" of personality adopts a by-then well accepted taxonomy derived from the caselaw. "Privacy" (*Privatsphäre*) covers home, family life, and such.

"Intimacy" (*Intimssphäre*) concerns one's thoughts and feelings (including their expression in diaries and letters) as well as matters of health or intimate relationships. "Individuality" (*Individualsphäre*) includes one's right of self-determination, to personal characteristics, and to their manifestation to the outside world.

197. GÜNTER SCHAUB ET AL., *LABOUR LAW IN GERMANY: AN OVERVIEW* 50 (Angelika Haarkamp et al. trans., 4th ed. 1991).

198. *See id.* at 48.

199. *See id.* at 50.

ception. If American law could conceive of the test as invasive, it would be in terms of the unduly intrusive character of the particular questions.²⁰⁰ Under German law, the evil in the use of personality tests is not only or even necessarily in the intimate nature of particular questions, but in the very process which, by "reducing a human being to a mere object of examination" [*zum Untersuchungsobjekt herabgewürdigt wird*] and "stripping him psychologically naked" [*den Menschen psychologisch bis zur Nacktheit ausziehen*]²⁰¹ is inherently dehumanizing.²⁰²

The purpose here is not only to point to the availability of alternative working legal conceptions and to argue, as Pound did, for greater receptivity, just as Warren and Brandeis looked to French law to inform their theory at its inception, but also to emphasize how resistant we have become even to think in terms any broader than our law currently conceives. This is amply illustrated in Westin's treatment of the computerized monitoring of work.

IV. "PRIVACY" MISAPPLIED? MONITORING WORKERS BY COMPUTER

The growth of sophisticated computer technology has enabled employers to monitor employees so intensively as to resemble, in Shoshana Zuboff's analogy, the panoptic prison designed by Jeremy Bentham.²⁰³ In work performed on a computer, the worker sits before a Video Display Terminal and as the worker watches the terminal, the terminal can, in effect, watch the employee: Each keystroke

200. See *Soroka v. Dayton Hudson Corp.*, 1 Cal. Rptr. 2d 77, 85 (Ct. App. 1991).

201. Dieter Leuze, *Bemerkungen zu dem allgemeinen Persönlichkeitsrecht des Arbeitnehmers und zu seinen Einschränkungen*, 7 ZTR 267, 270 (1990) (references omitted). The verb, *herabwürdigend*, carries a pejorative connotation as to "disparage" or to "denigrate." The idea was expressed in a treatise on constitutional law in 1968, that "human dignity is violated when a man is reduced to an object of assessment, to a mere means." Quoted in Karlheinz Schmid, *Die rechtliche Zulässigkeit psychologischer Testverfahren im Personalbereich*, 42 NEUE JURISTISCHE WOCHENSCHRIFT 1863, 1864 (1971) ("Nach Maunz-Dürig-Herzog ist die Menschenwürde getroffen, wenn der konkrete Mensch zum Objekt, zu einem bloßen Mittel, zur vertretbaren Größe herabgewürdigt wird.") (reference omitted). It has since become the generally accepted, and oft-repeated, view.

202. Detlev Peukert cautions that we underestimate the Third Reich if we pay attention only to the sadistic and grotesque, though there is ample evidence of how far sophisticated professionals were eager to go in treating people as objects. See, e.g., TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 514-16 (1992). Peukert illuminates how the medical establishment, resting upon a tradition of psychological and anthropological research and making political alliance with professional welfare workers, was quite prepared to institute a scheme of forced sterilization that would sort people according to their "genetically determined social value." DETLEV J. K. PEUKERT, *INSIDE NAZI GERMANY: CONFORMITY, OPPOSITION, AND RACISM IN EVERYDAY LIFE* 233-234 (Richard Deveson trans., 1987).

203. See SHOSHANA ZUBOFF, *IN THE AGE OF THE SMART MACHINE* 315-86 (1984).

can be recorded and timed, time in which no strokes are made can be recorded (as when the employee takes work break or goes to the restroom), errors (and corrections) can be recorded as well; the employee's record can be displayed by unit of time or compiled over time, and compared with those of fellow workers. Computerized badges can be required which record when one enters and leaves the workplace, where one is in the workplace at any moment in time (as when one enters and leaves the restroom) and for what periods of time, even the particular food and beverages items the employee purchases in the company lunchroom; and, again, these records can be stored, compiled, and compared.

Westin argues that the use of this technology may pose serious issues of fairness and of psychological and, perhaps, physical stress, but not privacy. First, when employees enter the employer's premises they have left the "private" space and are in a "public" area, i.e., an area where they recognize they are subject to supervision and control. Second, historically American employers were entitled to "see all, hear all, collect all." Third, though the technology may have intrusive, dehumanizing uses, it may also be used in a fair, dignity-respecting manner.²⁰⁴ Consequently, issues of fairness and stress should be the focus of union-management negotiations in organized workplaces, and of enlightened management policies in non-union ones, but not of the law of privacy.²⁰⁵ In fact, the claim of invasion of privacy, of "Big Brotherism," is invoked for rhetorical/political purposes by those opposed to the technology per se, and, in so doing, they wrench the concept from its moorings. All the threads of his argument come together thusly:

American employers have traditionally been entitled to watch employees when they are actually at work, to supervise their work processes, and to inspect and evaluate their work product according to work standards and procedures set by the employer. Labor un-

204. See ALAN F. WESTIN ET AL., *THE CHANGING WORKPLACE: A GUIDE TO MANAGING THE PEOPLE, ORGANIZATIONAL AND REGULATORY ASPECTS OF OFFICE TECHNOLOGY* 6-7 (1985):

Unlike the use of TV monitors to watch assembly lines, or of hidden microphones to overhear workers in cafeterias or rest rooms, the collection of operator-production statistics generated by system software does not represent an intrusive, unethical, or dehumanizing act *per se*. Whether the effect of monitoring is intrusive, unethical or dehumanizing depends on what management does with the data it collects and how its actions are perceived by employees.

205. See Alan F. Westin, *Monitoring and New Office Systems* in *PROC. OF THE FORTY-FIRST ANN. MEETING OF THE NAT'L ACAD. OF ARB.* 165, 173 (1989) ("I do not believe that regulation by law or by an arbitrator's importation of public-law standards is called for on privacy grounds. In my judgment, this is a basic labor-management issue, or, in nonunion settings, a basic employee relations issue.").

ions have long protested when they saw coercive work monitoring used to drive workers to unrealistic and high-stress quotas. These protests have usually focused on unfair standards or inadequate compensation, not the *fact* of supervisors watching or listening to workers at work. However, wholesale union opposition to work monitoring sometimes functions as an emotionally-charged weapon in the on-going power struggle between management and unions.²⁰⁶

The argument seems plausible, but only because it measures the interests potentially invaded against our common law conception: The law of privacy does not conceive of the physical workspace one enters as a place of personal "seclusion."²⁰⁷ Autonomy on the job can have no greater claim upon the law of privacy than autonomy off the job which, as we have seen, is no claim at all. But the argument is quite wrong insofar as it speaks to the "historical" entitlement of employers to watch, supervise, and inspect. Craft workers in the nineteenth century "often would not work at all when a boss was watching."²⁰⁸ At the turn of the century, Cornish miners in the West refused to work when a manager was present.²⁰⁹ As late as the 1950s, unionized printers had the right to stop work if a manager entered the composing room during working hours.²¹⁰

The male craft workers' claim of freedom from observation by supervision was in counterpoint to the one employment of the period in which the employee was subject to constant monitoring, i.e. live-in domestic service. Although these jobs paid relatively better than others available to female workers of the period, they were largely shunned (resulting in turnover rates that produced "the servant problem" so vexing to nineteenth century matrons) because the workers deeply resented the constant supervision and monitoring, the invasion

206. Westin, *supra* note 1, at 277. It seems to the reader, however, that Westin had earlier cited a primitive form of mechanical work monitoring as an ostensibly invasive form of "physical surveillance."

In Grand Rapids, Michigan, the Dochler-Jarvis division of National Lead Co. installed a "Tele-Control" system of red and green lights on machines and taped records of machine attendance. As a UAW official explained: "The tape measures the productivity of each employee in fractions of seconds . . . all day. If you were to leave your machine for one minute . . . [the tape] tells them that also."

WESTIN, *PRIVACY AND FREEDOM*, *supra* note 3, at 108.

207. See, e.g., *Ulrich v. K-Mart Corp.*, 858 F. Supp. 1087, 1095 (D. Kan. 1994).

208. DAVID MONTGOMERY, *WORKERS' CONTROL IN AMERICA: STUDIES IN THE HISTORY OF WORK, TECHNOLOGY, AND LABOR STRUGGLES* 13 (1979).

209. See ALAN DERICKSON, *WORKERS' HEALTH WORKERS' DEMOCRACY: THE WESTERN MINERS' STRUGGLE, 1891-1925*, at 5 (1988).

210. See SEYMOUR MARTIN LIPSET, ET AL., *UNION DEMOCRACY: THE INTERNAL POLITICS OF THE INTERNATIONAL TYPOGRAPHICAL UNION* 24 (1956).

of privacy.²¹¹ Both the work and the workers were demeaned by these conditions.

Nor does the contemporary survey data Westin cites argue to a sea change in our values. He points to the very substantial agreement of employees and the public at large that employers should be allowed to monitor customer telephone calls "when the listening-in is done to assure the courtesy and correctness vital to delivering good customer-service"²¹² so long as employees understand that it is being done. But telephone interception "vital to delivering good customer-service" is an allowable exception from the federal prohibition on telephonic eavesdropping.²¹³ And when Illinois amended its law to allow telephone monitoring of employees more generally "for educational, training, or research purposes,"²¹⁴ the unions in the state led a successful legislative effort to limit the law to "quality control of marketing or opinion research or telephone solicitation."²¹⁵ In other words, what the survey data reveal is that the public generally approves of the balance struck by the law regulating employer practices in this area. These data say nothing about whether the law should intervene in other unregulated areas of employee monitoring.

Westin is quite correct when he observes that technology may not be invasive of privacy *per se*. Neither is human supervision invasive of privacy *per se*. However, the uses to which the technology is put may be invasive, just as the uses of human supervision may be invasive. If a company were to assign a human supervisor physically to accompany the employee throughout the work day from arrival to departure, to log every moment spent, his every motor movement, error and correction, to record his physical movements about the workplace, break times and locations, I should think that as a matter of common understanding, of common parlance, the worker made subject to such scrutiny would be heard to complain that it violated his privacy—and rightly.

Thus, Westin's argument proceeds neither from history nor from common parlance, but from our common law understanding of what

211. See generally DAVID M. KATZMAN, SEVEN DAYS A WEEK: WOMEN AND DOMESTIC SERVICE IN INDUSTRIALIZING AMERICA 178-79, 236-37 (1978); DANIEL E. SUTHERLAND, AMERICANS AND THEIR SERVANTS: DOMESTIC SERVICE IN THE UNITED STATES FROM 1800 TO 1920, at 117-18 (1981).

212. Westin, *supra* note 1, at 279.

213. See generally Martha W. Barnett & Scott D. Makar, "In the Ordinary Course of Business": The Legal Limits of Workplace Wiretapping, 10 HASTINGS COMM. & ENT. L.J. 715 (1988).

214. 720 ILL. COMP. STAT. ANN. 5/14-3(j) (West 1996).

215. *Id.* at 5/14-3(j)(i).

privacy is, and is not: Computerized monitoring of workers does not pose a legal privacy issue because there can be no "reasonable expectation" that the technology would not be so used, especially if notice is given, and its use is not "unreasonably offensive" because it serves a legitimate business purpose. In other words, computerized monitoring implicates no legally cognizable privacy interest because our legal conception of privacy does not speak to systematically intrusive forms of total oversight and control. This is the very point this lecture has been attempting to make.

Accordingly, the purpose of the comparison to German law is to show it is possible for the legal system of an advanced Western industrial country to acknowledge and accommodate authentic privacy interests that our law ignores because we have defined them away. Under German law, the employees' elected works council has a right of codetermination over statutorily enumerated subjects. Moreover, the works council is expressly enjoined to protect the worker's right of personality. One of the statutory subjects of codetermination is the "introduction and use of technical devices designed to monitor the behavior or performance of employees."²¹⁶ How this provision applies to computerized monitoring of work was decided by the Federal Labor Court in the early 1980s. In a 1983 case concerning the use of computers to monitor Pan-American Airlines booking agents, the court stressed the relationship between the purpose of protecting individual personality and role of codetermination.²¹⁷ It reiterated, however, that only data recorded on an individual basis could so infringe, not data recorded of a group from which individual data could not be extracted. How such individually recorded data might infringe upon the right of personality was explained more fully the following year in a case concerning the introduction of a computer system to monitor individual technicians' work to control (and price) inventory of parts as well as to monitor technician training.²¹⁸ The court rejected the argument that the work, not the worker was being monitored. So long as individual performance data could be called up, the introduction of the technology was statutorily covered. The court then catalogued the several ways in which this monitoring threatened the right of personality, which, for analytical purposes can be separated into three groups:

216. GÜNTER HALBACH ET AL., *supra* note 197, at 372.

217. See BAG (Bundesarbeitsgericht), NWJ, 25 (1984), 1476.

218. See BAG, ABR, 1 (1984), 23/82.

1. A loss of context in the display of the data; the failure to take account of human idiosyncracies; the appearance of precision in spite of errors at the source; the unlimited possibilities of manipulation in evaluation.

2. The fact that the machine never forgets; the unavailability of effective defensive countermeasures for the employee to insulate himself from control; and so the persistent pressure to conform (*Anpassungsdruck*) which heightens the employee's subordination to the employer.

3. The loss of informational self-determination resulting from the pressure to give that information about oneself (*Informationsdruck*); and, the consequent rendering of the worker a "naked object of assessment" (*einem bloßen Beurteilungsobjekt*).

The first coincides with the issue of fairness Westin identifies. The second coincides with the issue of stress. But the third, conjoining the right not to disclose information about oneself against one's will and the right not to be reduced to a mere object of examination, is privacy. The use of computer technology to monitor the worker is akin to the use of a psychological test—it has the potential to render its subject transparent: "to glassed men" (*den gläsernen Menschen*).²¹⁹ In the German conception, each of these elements, individually and in combination, pose a potential of violating the right of personality.²²⁰ Hence the need for legal protection.

However, the nature of that protection bears brief comment. Our system conceives of our communal norms regarding privacy primarily in terms of tort, but tort is an extraordinarily unwieldy means of dealing with many of these issues, particularly with computerized work monitoring. As Westin points out, the computer can be used in

219. The phrase was used in a press account on the issue, *Frankfurter Zeitung, Blick Durch die Wirtschaft*, December 8, 1983, and was later picked up and used disparagingly by a critic of the Federal Labor Court's decision which the critic took to hinder the efficient control of the workforce. Wolf Hunold, *Anmerkung*, 3 *BETRIEBS-BERATER* 195, 196 n.5 (1985).

220. See BAG, *supra* note 218, at 380-81.

The knowledge that behavior and performance data are assembled produces a pressure to conform which leads to a heightened subordination [*Abhängigkeit*] which must therefore hinder the free development of the employee's personality. The objectivization of the employee which hinders the free development of his personality transgresses his right to personality according to the law decided by the Supreme Constitutional Court. (Das Wissen um eine derartige Verarbeitung von Verhaltens- und Leistungsdaten erzeugt einen Anpassungsdruck, der zu erhöhter Abhängigkeit des Arbeitnehmers führt und damit die freie Entfaltung seiner Persönlichkeit hindern muß. Gerade die Objektstellung des Arbeitnehmers und dessen Behinderung in der Entfaltung seiner Persönlichkeit stellen sich aber nach der Rechtsprechung des Bundesverfassungsgerichts als Eingriffe in sein Persönlichkeitsrecht dar.)

Abhängigkeit is usually translated as "dependence." In this context, however, "subordination" seems closer to the intended meaning, and it has been translated as such in other settings. See Abbo Junker, *Labor Law in INTRODUCTION TO GERMAN LAW* 305, 316 (Werner F. Ebke & Matthew W. Finkin eds., 1996).

a fair, dignity-respecting manner. Leaving it to a civil jury to decide whether the introduction of a computerized system fell on one side of the line or the other in a suit for damages after the system has been installed would be a terribly awkward way to deal with the issue.²²¹

Note, then, the form of legal protection involved in these German cases. The issue was whether the introduction of the technology was subject to codetermination with the employees' elected works council. Even though a system of labor courts is available to consider any alleged infringement of an employee's right of personality, the law expects that a satisfactory balance of the competing interests will be worked out in negotiations.²²² Westin has drawn an analogous conclusion in his work elsewhere, that "employee involvement in the initial design, testing, implementation and continuing adjustment of work monitoring is critical to a successful process . . ." ²²³ But he does not consider a role for law here, to assure employee participation in this process independent of the employer.

If employee survey data are relevant, then survey data here may be instructive. According to Richard Freeman and Joel Rogers, sixty-three percent of American employees would like to have more influence over decisions that govern their workplace lives,²²⁴ and a substantial majority want that influence exercised independent of managerial control,²²⁵ but workers identify management's unwillingness to give up power as the major obstacle to meaningful participation.²²⁶ Do these data suggest another gap where our law fails to meet our people's needs?²²⁷

221. Pound made much the same point in a passing reference from Rudyard Kipling: "Is a man sad? Give him money, say the Sahibs. Is he dishonored? Give him money, say the Sahibs. Hath he a wrong upon his head? Give him money, say the Sahibs." *Quoted in* Roscoe Pound, *Interests in Personality*, *supra* note 183, at 446 n.72 (references omitted). Note, however, that a German Labor Court may enjoin an employer policy or practice that violates the right of personality.

222. *See generally* Spiros Simitis, *Mitbestimmung als Regulativ einer technisierten Kontrolle von Arbeitnehmern*, 8 NJW 401 (1985).

223. WESTIN ET AL., *supra* note 204, at 6-7.

224. *See* Richard Freeman & Joel Rogers, *Worker Representation and Participation Survey: First Report of Findings 6* (Dec. 5, 1994) (on file with author).

225. *See id.* at 9.

226. *See* Richard Freeman & Joel Rogers, *Worker Representation and Participation Survey: Second Report of Findings 8-9* (June 1, 1995) (on file with author).

227. *See generally* ARCHIBALD COX ET AL., *LABOR LAW 1002-1010* (12th ed. 1996) (surveying proposals to remedy the "representation gap").

CONCLUSION

This Lecture has been in part an excursion in comparative law. Better to understand how we conceive of employee privacy—what we do and, more importantly, do not protect—German law has been looked to, but not because it is unique. On the contrary, the law in several European countries is as protective of employee privacy if not more.²²⁸ Germany has been looked to because its law flows from bitter experience with the relationship between total controls and habits of mind. The law there rests not only on jurisprudential foundations with roots in the 16th century, but also on the modern appreciation of the intimate relationship between an habituation to authority and the formation of tolerant, autonomous citizens.²²⁹ That is what makes our law, in comparison, so disturbing, for we permit the creation of near total institutions: Where a person is screened for genetic and psychological acceptability, interviewed, surveyed, and put in interactive groups to instill loyalty and passivity, told how to dress (or put in a uniform), surveilled by cameras, monitored by computers, randomly tested for forbidden substances, told who not to associate with, what charitable organizations to support, what leisure time activity not to enjoy, and what social messages to display. Many of these practices are not widespread, but some are. Little in our law would inhibit resort to any of them. Many of these practices would not be widespread in Germany today; but German law constrains them all.

Have we nothing whatsoever to learn from the German experience? They, too, thought science a substitute for morality. They, too, thought complete conformity a communitarian virtue. And they, too, celebrated obedience in an ethic of efficiency. But then, unlike the Germans, 1933-1945, we are free.²³⁰

228. See generally International Labour Office, *Worker's Privacy Part III: Testing in the Workplace*, 12 CONDITIONS OF WORK DIG. NO. 2 (Geneva, 1993) (surveying issues relating to tests administered to job applicants and employees); International Labour Office, *Workers' Privacy Part II: Monitoring and Surveillance in the Workplace*, 12 CONDITIONS OF WORK DIG. NO. 1 (Geneva, 1993) (examining concerns relating to intrusive workplace surveillance of employees by employers); International Labour Office, *Workers' Privacy Part I: Protection of Personal Data*, 10 CONDITIONS OF WORK DIG. NO. 2 (Geneva, 1991) (addressing issues relating to collection of worker's private information); Symposium, *Worker Privacy*, 17 COMP. LAB. L.J. 1 (1995) (surveying worker privacy rights in ten countries).

229. Cf. NORBERT ELIAS, *THE GERMANS: POWER STRUGGLES AND THE DEVELOPMENT OF HABITUS IN THE NINETEENTH AND TWENTIETH CENTURIES* (Eric Dunning & Stephen Mennell trans., 1996).

230. Cf. MILTON MEYER, *THEY THOUGHT THEY WERE FREE: THE GERMANS 1933-1945* (1955).

