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Theft of Time: Disciplining through Science and Law

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Theft of Time: Disciplining through Science and Law

Abstract

This commentary traces the genealogy of "theft of time," a newly discovered offence committed by employees against employers. A Foucauldian perspective is used to examine how truth claims from science, technology, and law constitute categories through which groups are sorted, classified, and censured: the processes of naming, blaming, and shaming. This commentary argues that to understand why some truth claims are heard and acted upon, while others are ignored or silenced, it is necessary to link the power/knowledge nexus to political economy, the structural dominance of capital, and the power relations thereby created and reinforced.

THEFT OF TIME: DISCIPLINING THROUGH SCIENCE AND LAW[©]

BY LAUREEN SNIDER*

This commentary traces the genealogy of “theft of time,” a newly discovered offence committed by employees against employers. A Foucauldian perspective is used to examine how truth claims from science, technology, and law constitute categories through which groups are sorted, classified, and censured: the processes of naming, blaming, and shaming. This commentary argues that to understand why some truth claims are heard and acted upon, while others are ignored or silenced, it is necessary to link the power/knowledge nexus to political economy, the structural dominance of capital, and the power relations thereby created and reinforced.

Ce commentaire examine la généologie du “vol du temps” – soit une infraction nouvellement définie, commise par les employés à l’encontre de leurs employeurs. Une perspective foucauldienne est utilisée pour examiner comment les vérités qui nous proviennent de la science, la technologie et le droit constituent des catégories par lesquelles les groupes sont triés, classifiés et censurés – et qui sont équivalents aux processus de la désignation, le reproche et l’humiliation. Ce commentaire soutient que pour comprendre pourquoi certaines vérités sont entendues et mises en exécution tandis que d’autres sont ignorées ou réduites au silence, il est nécessaire de faire le lien entre la relation pouvoir-savoir et l’économie politique, la dominance structurale du capital et les relations du pouvoir (à la fois créées et renforcées) qui en découlent.

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I. INTRODUCTION: THE SIGNIFICANCE OF CRIME CREATION

In America's one-sided class war, employers have taken to monitoring employees' workplace behaviour right down to the single computer keystroke or bathroom break.¹

Time theft steals money as sure as someone picking your pocket. ... It is America's biggest crime, and until its victims -- the owners and managers of American industry -- decide to do something about it, we'll continue to be stolen blind.²

This commentary examines the genealogy of crime creation through an investigation into the discovery and management of a new type of crime against capital. Theft of time, defined as the misuse of the employer's time and property by an employee, is rooted in nineteenth century Taylorist discourses on time management and productivity. However, theft of time has come into its own in the twenty-first century workplace, spurred by a combination of ideological and technological developments. The purpose of this commentary is to begin to document and explain this phenomenon.

My interest in this subject stems from earlier work on the disappearance, in statute and fact, of corporate crime. Creeds of neo-liberalism, rationalized by globalization, have persuaded governments throughout the industrialized world to repeal legislation aimed at controlling or censuring the anti-social acts of capital.³ The most ardent evangelists of this point of view come out of the United States, not coincidentally the nation with the lion's share of world power and wealth. This commentary focuses on American practices and law because the United States sets the tone for countries around the globe. By persuasion, coercion, or example, and through its all-powerful media, market force, government, military, or theoretically international associations such as the World Bank or the World Trade Organization, what happens in the United States is pivotal. As Braithwaite⁴ has explained, periphery apes centre. Thus, whether or not appropriate to their own history and culture, states

¹ B. Ehrenrich, "Warning: This is a Rights Free Workplace" *New York Times Magazine* (5 March 2000).

² R. Half, "Beating the System: How Time Theft Costs \$137 Billion a Year" (1983) 63:10 *Personnel J.* 80 at 80.

³ See L. Snider, "The Sociology of Corporate Crime: An Obituary" (2000) 4:2 *Theoretical Criminology* 169; L. Snider, "Relocating Law: Making Corporate Crime Disappear" in E. Comack, ed., *Locating Law: Race-Class-Gender Connections* (Halifax: Fernwood, 1999) 183.

⁴ See J. Braithwaite, "A Sociology of Modelling and the Politics of Empowerment" (1994) 45:3 *Brit. J. of Soc.* 445.

throughout the world tend to reproduce ideas and structures embraced by the United States more quickly than ever with the advent of globalized communication systems.

As neo-liberalism gained strength over the last two decades of the twentieth century, virtually every developed nation retreated from its historic obligation to assure the welfare of citizens by restraining and punishing corporations for antisocial policies and acts. It was argued that state laws that disciplined business it were expensive, unnecessary, inappropriate, and draconian. Corporations were to be viewed as complicated organisms run by well-intentioned, well-educated management teams. Harmful acts in which they might—accidentally, of course—engage were better handled by gentle persuasion or education rather than by arrest and prosecution. Market mechanisms such as competition and licencing were more efficient and cost-effective than laws against corporate crime. Thus, pollution permits could replace laws against environmental crime; those who would fix or defraud markets would be automatically disciplined (at no cost!) by free trade and global competition, and voluntary compliance or self-regulation would deliver better worker protection than state law, enforced as it necessarily was by a bloated and bureaucratic government aligned with fat cat unions. In this discourse, government was always represented as fat or soft; business, in stark contrast, was lean, mean, and equipped to survive in the real world.

Such arguments fit well with downsizing, deficit-cutting agendas in the nation state and with the newly discovered “need” to cut corporate taxes to allow business to compete in the highly touted “global” marketplace. Thus, laws against false advertising and hazardous products; laws stipulating minimum wage levels, maximum hours of work, or overtime pay; and laws setting standards and punishing businesses for poisoning the air or water, were systematically repealed, reformed or rendered inoperative by draconian budget and staff cuts. Through deregulation, decriminalization, and downsizing, corporate crime vanished, ideologically, politically, and legally.⁵ However, at the same time that laws disciplining

⁵ Of course these are generalizations. There are differences in the degree to which this has occurred by nation states and across different regulatory areas. Also, regulation has been restored in some areas, typically following privatization or disaster. See e.g. S. Tombe, “Law, Resistance and Reform: ‘Regulating’ Safety Crimes in the UK” (1995) 4:3 Soc. & Legal Stud. 343; K. Calavita, H. Pontell & R. Tillman, *Big Money Crime*, (Berkeley: University of California Press, 1997); S. Tombs, “Injury, Death of the Deregulation Fetish: The Politics of Occupational Safety Regulation in U.K. Manufacturing Industries” (1996) 26:2 Int’l J. of Health Services 309; L. Snider, “Zero Tolerance Revised: Constituting the Non-Culpable Subject in Walkerton” (Annual Meeting of Canadian Law and Society, Vancouver, British Columbia, 31 May 2001) [unpublished]; and E. Tucker, “And Defeat Goes

employers disappeared, laws disciplining employees were strengthened. The legal rights of employees, such as the right to resist sixty-hour work weeks, or refuse work in unsafe environments were eliminated, while new offences against employers were discovered and denounced. Theft of time, invented and brokered as a social problem by academics in business schools, organizational psychology, sociology, and criminology, is a quintessential example of this process.

The links between knowledge, power, and discipline, usually credited to Foucault,⁶ have often been noted. In the first instance, theft of time was made conceivable by ideas and languages developed in the early days of the Industrial Revolution, ideas that conceptualized time as a measurable commodity to which value could be assigned. Through the alliance of science and technology, timepieces (watches and clocks) were invented, making it possible for eighteenth century factory owners to begin paying workers by the hour. Such ways of thinking constitute the framework for punishing troublesome individuals by sentencing them to “do time” in specialist institutions (such as penitentiaries). Also, with factories replacing the home, shop, and pasture as the dominant sites of production, it became possible to conceive of time-motion studies, time-clocks, and other devices to measure the link between productivity, time, and the costs of production. Efficiency, for example, is an inherently time-bound concept. Thus, technology, namely inventions pioneered by natural and applied science, in combination with the “science of man,” which are the disciplines of social science, are components of a knowledge-power nexus that measures, knows, and disciplines people through their institutional, public, and private roles.

New categories of knowledge are discursively constituted through social science, with each discipline putting forth a set of claims to “truth” over a particular area of human behaviour. These claims to truth are also claims to power, the power to define how people think and, therefore, how they act or “should” act. This agenda-setting power influences what kinds of behaviours come to be seen as “social problems,” or what constitutes an “efficient” workplace or a “realistic” policy initiative. This power has important, tangible effects on peoples’ life prospects, institutions, and on what people see as possible, necessary, and desirable in their own lives, both within and outside the workplace. Although the power to conceptualize reality is neither owned nor monopolized by any one discipline, institution,

On: An Assessment of ‘Third-Wave’ Health and Safety Regulation” in F. Pearce & L. Snider, eds., *Corporate Crime: Contemporary Debates* (Toronto: University of Toronto Press, 1995) 245.

⁶ See M. Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Pantheon, 1979).

or class, nor blindly imposed on helpless subject populations, it is also not freely and equitably distributed across race, gender, and class boundaries. Although arguments about truth are actively debated, contested, and resisted within the academy and beyond, the playing field of ideas is not level but tilted. Truth claims are hierarchically ordered.⁷ Thus, certain voices, certain ways of seeing and conceptualizing the world, are more powerful than others.

In the industrialized, capitalist, democratic state, the loudest voices are those connected to key interests and, therefore, to privilege. The most persuasive, best publicized, and most assiduously promoted claims are those of first world-elites, claims which support, secure, or reinforce their own privilege. Only those in charge of the transnational corporation or the territory called the nation state can speak in its name or on its behalf. Additionally, the claims of elites are most likely to come fully clothed in the latest legitimizing concepts, such as modernity, efficiency, or prosperity. These claims will be fine-tuned to resonate with dominant cultural themes. In the increasingly corporate-driven university, key elites, particularly those that own and/or control institutions of economic and political power, direct the production of knowledge. Corporate elites, for example, influence which questions knowledge professionals will ask and structure how these questions will be defined, researched, and answered, by endowing chairs, sponsoring competitions, and funding private think tanks. Once knowledge is produced, elites who own and control mass media and generate mass culture through entertainment and sport are best positioned to publicize and popularize privilege-reinforcing claims.

Eventually, through this process, some of these ideas and claims achieve the status of “fact.” These ideas have been removed from the realm of political and contentious claims, that are open to disagreement and debate, and transformed into “common sense” assumptions or things that everyone just “knows.” Thus, when the lead stories in print and television regularly feature experts claiming that the deficit is the major threat to Canada’s prosperity in the twenty-first century, or that a massive brain drain of talented individuals caused by “excessive” tax rates is underway, or that “lax security” allows terrorists and criminals to enter Canada at will, these issues come to be seen as social problems and these receive national attention. This does not mean that there is no resistance, or that claims not supported by key elites never make the transition from knowledge claim to fact. Resistance is continuously generated and counter-hegemonic claims

⁷ See arguments developed in “The Sociology of Corporate Crime: An Obituary,” *supra* note 3.

are sometimes heard. Ongoing battles over global warming, genetically modified foods, refugee rights, and sexual harassment are examples of elite-contested claims that have gained publicity and a measure of acceptance. Still, the process generally takes longer, claim-makers are held to a much higher standard of truth, and incessant vigilance is required to maintain any substantive consequences the claim may have (to secure law enforcement, for example). Elite-endorsed claims, experts, and studies, on the other hand, tend to be fast-tracked. These claims become front page news in mainstream or “reputable” publications, while opposing claims and experts are absent or marginalized, and portrayed as radicals or special interest groups spouting opinions rather than facts.

Productivity, including the knowledge claims that constitute the concept of productivity, is a pivotal issue, vitally important to business elites because maximizing productivity is fundamental to profitability. Higher profit levels and share prices mean more prosperity, privilege, and power accrue to those who own, administer, and control corporations since these groups reap a disproportionate share of profits.⁸ Therefore, it is not surprising that questions about productivity and its allied concept, efficiency, have been front and centre since the dawn of the Industrial Revolution, dominating research agendas in many academic disciplines. While hundreds of studies have examined productivity from every possible perspective, particular attention has been focused on the basic human denominator, the worker. Thus, psychology typically concentrated on worker motivation, sociology on group relations and the working environment, including everything from early studies linking light levels and productivity to sexual harassment today, economics on identifying, conceptualizing, and managing efficiency. The study of the problematic-because-unproductive employee, then, is not new.

However, linking productivity, or the lack thereof, to criminality is new. Transforming the unproductive employee into the criminal is significant. Not that law has ever been absent from the workplace; rather, employment and contract law have always focused on regularizing the employee-employer relationship.⁹ Still, it is significant because calling something “criminal” is an ideological and moral claim. It categorizes a

⁸ See A. Yalnizyan, *The Growing Gap* (Toronto: Centre for Social Justice, 1998); United Nations, *Human Development Report* (New York: United Nations, 1996); and Statistics Canada, *Income Distributions by Size in Canada* (Ottawa: Ministry of Supply and Services, 1997).

⁹ See the excellent summary and overview in J. Fudge & E. Tucker, “Law, Industrial Relations and the State: Pluralism or Fragmentation? The Twentieth Century Employment Law Regime in Canada” (2000) 46 *Lab./Le Trav.* 251.

particular behaviour as an act that causes social harm, one that injures everyone in a geographically defined area. The act is no longer a private matter, nor a dispute to be settled by the parties directly involved. Furthermore, calling an act a crime is a claim for public resources, a summons that obligates the state to monitor and enforce. In the case of theft of time, the state is required to unleash its moral and legal power on behalf of employers, as the victims, to reign in or discipline employees, as the offenders or the criminals.

The earliest explicit reference to theft of time, in sociological and criminological literatures, is in Hollinger and Clark's 1983 self-report study on occupational crime.¹⁰ The authors administered questionnaires to a large sample of employees, mostly low and middle-level staff, in a broad range of business and government organizations. Subjects were asked whether or not they or their co-workers had participated in a list of on-the-job behaviours, from theft of money or goods, to faking illness or covering unauthorized absence. The authors coined the term "theft of time" to describe certain employee behaviours, such as coming back late from breaks, conducting personal business on the job, or loafing around while pretending to be working. They claimed that employee theft was widespread, a fact they attributed to job dissatisfaction, to perceived (not absolute) need, and to youth. Younger workers were more likely to offend, and they and the newly hired were more likely to be apprehended.

The bulk of academic claim-making around theft of time, however, has come from other disciplines. Social scientists working in business schools, human or industrial relations, or private think-tanks and consulting firms, have been particularly active. With the advent of new technologies, communication systems, computers, and the Internet, the study of employee resistance and its causes and remedies has become an academic growth area. Particularly in applied and multidisciplinary fields, the study of time theft has come into its own.

II. TIGHTENING THE SCREWS ON EMPLOYEES: NAMING, BLAMING, AND SHAMING

Crime creation is a process with several distinct parts. First, the offence must be isolated and named. Those making the claim must explain why the activity is bad and how it produces harm to society or to vulnerable members within society. Incidence is critical here; the behaviour is

¹⁰ R.C. Hollinger & J.P. Clark, *Theft by Employees* (Lexington: Lexington Books, 1983).

frequently presented in disease metaphor, for example, as “a raging epidemic” that is “out of control.” Then, primary offenders and victims must be identified, categorized, classified, studied, and demographically and psychologically situated. Given the identification of modernity with the languages and methods of natural science, to be taken seriously, claims must be translated into numbers, then into statistical knowledge. A claim must be published in a “reputable” venue, then defended against counterclaims made by critics from the same and other disciplines or schools. Before the arrival of direct democracy in the form of victims’ movements and the tabloid press, crime creation occurred almost entirely through the debates of socially authorized “experts” in various social sciences, especially criminology and law, as well as through the interactions of these experts with policymakers.

As we shall see, the creation of theft of time follows the pattern outlined above, broadening and extending the concept of employee theft. Theft of employers’ property by employees has long been recognized as a criminal offence in law. Criminologists have classified employee theft as a subspecies of white-collar crime, naming it occupational crime. Shoplifting, pilfering, computer crime, and expense account theft are typical examples of occupational crime.¹¹ Debates over classification and typology in white-collar crime have preoccupied criminologists for more than half a century,¹² but occupational crime is generally recognized as distinctive because the typical victim is an organization, not an individual. It is an offence *against* business. This makes it very different, ideologically, politically, and economically, from organizational or corporate crime offences such as antitrust, dumping toxic waste, marketing fraudulent drugs, falsifying cotton dust levels, or asbestos fibre counts, which are offences *by* business that victimize the public, consumers, the environment, or employees.¹³

¹¹ See G. Green, *Occupational Crime* (Chicago: Nelson-Hall, 1997); D. Weisburd, E. Chayet & E. Waring, “White Collar Crime and Criminal Careers: Some Preliminary Findings” (1990) 36:3 *Crime & Delinquency* 342; S. Wheeler, D. Weisburd & N. Bode, “Sentencing the White-Collar Offender: Rhetoric and Reality” (1982) 50 *Am. Soc. Rev.* 641; and Hollinger & Clark, *supra* note 10.

¹² See S. Shapiro, “Collaring the Crime, not the Criminal: Considering the Concept of White-Collar Crime” (1990) 55 *Am. Soc. Rev.* 346; E. Sutherland, “White-Collar Criminality” (1940) 5 *Am. Soc. Rev.* 1; P. Tappan, “Who is the Criminal?” (1947) 12 *Am. Soc. Rev.* 96; and H. Edelhertz, *The Nature, Impact and Prosecution of White-Collar Crime* (Washington: National Institute for Law Enforcement and Criminal Justice, 1970).

¹³ As noted earlier, only corporate crime is undergoing decriminalization, only here is the naming, blaming and shaming process being reversed. It thus stands in stark contrast to occupational crime and, indeed, to overall social trends where criminalization (and punitiveness) have increased exponentially.

In the 1980s and 1990s, social scientists from a variety of disciplines and institutional settings studying employee behaviour and efficiency began to isolate time theft and “specialists” in this area began to appear. A number of surveys and self-report studies on employees came up with lists describing “serious types of employee dishonesty.”¹⁴ A typical list situates and categorizes theft of time alongside “unauthorized long-distance phone calls, supplies or equipment theft, missing inventory, illicit electronic funds transfer and the selling of trade secrets.”¹⁵ When popularized through the business press—the original and most faithful vehicle of dissemination of such claims—the studies became news, producing headlines noting that: theft of time is “insidious” and constant, an ongoing threat to corporate profits; it delivers “A Severe Blow to the Nation’s Productivity”; it is “An Abuse of Business”; it is “Canada’s Biggest Crime.”¹⁶ More important, given the centrality of United States in the economic world, theft of time is “America’s Biggest Crime: Time Theft—The Deliberate Waste, Abuse and Misappropriation of On-The-Job Time.”¹⁷

As the concept is popularized, it is, in academic parlance, “refined.” New categories are discovered and investigated, old ones are extended. Theft of time soon includes: “idle chatter”; “hours spent on the phone with family and friends”; “counterproductive behaviour”; “holiday season shirking”; “arguing with customers”; “unauthorized long-distance calls”; “overstating time sheets”; “taking extended breaks, arriving at work late, leaving early, reading on company time” and even “over-associating with co-workers.”¹⁸ Description and categorization slide into censure.

¹⁴ See e.g. M. Boye & K. Slora “The Severity and Prevalence of Deviant Employee Activity within Supermarkets” (1993) 8:2 *J. of Bus. & Psychol.* 245; R. Half, “Beating the System: How Time Theft Costs \$137 Billion a Year” (1983) 63 *Personnel J.* 80; K. Slora, “An Empirical Approach to Determining Employee Deviance Base Rates” (1989) 4:2 *J. of Bus. & Psychol.* 199; and N. Snyder, K. Blair & T. Arndt, “Breaking the Bad Habits Behind Time Theft” (1990) 40 *Bus.* 31.

¹⁵ D. Filipowski, “For Millions of Employees, Crime Does Pay” (1993) 72 *Personnel J.* 49 at 49.

¹⁶ “Time Theft Hurts Profits” (1991) 114 *The Office* 32 at 32 [hereinafter “Time Theft”]; “Time Theft Deals a Severe Blow to the Nation’s Productivity” (1982) 13:2 *Canadian Office* 4 at 4; R. Hayes, “Employee Abuse of the Business” (1990) 35 *Supervisory Mgmt.* 7 at 7; and “Canada’s Biggest Crime” 71:35 *Fin. T. of Can.* 17 at 17.

¹⁷ “America’s Biggest Crime: Time Theft—The Deliberate Waste, Abuse and Misappropriation of On-The-Job Time” (1984) 36:1 *Volume Retail Merchandising* 34.

¹⁸ “Time Theft”, *supra* note 16 at 32; K.B. Slora, “An Empirical Approach to Determining Employee Deviance Base Rates” (1989) *J. of Bus. & Psychol.* 199; D. Christina, “’Tis the Season When No One is Working” *Wall Street Journal* (23 December 1994) B1; “Study Shows Supermarket Employees Stealing More” (1992) 36 *Security Mgmt.* 11; Filipowski, *supra* note 15 at 49; “Incorrect Time Sheets” (1993) 54 *Supervision* 21 at 21; and “Time Theft: Survey Finds is Costs Bosses Whopping \$15B in ’82”

Labels, preferably eye-grabbing and pithy, are devised. Some of the most common include: "time bandits," "time thieves," "the organizationally impaired," and "loafers" who are constantly "goofing off."¹⁹

Finally, and most significantly, since numbers carry a legitimacy that "mere" words do not, the claim was rendered in numerical form and statistically calibrated. As one claim-maker put it, "most of the companies were well aware of the problem [of time theft], but *they never thought it was serious until we started to put some numbers to it.*"²⁰ The number of offenders and the economic cost of time theft were computed, then the yearly cost announced. Studies quantifying the vast amounts lost to "goof-off" employees have received maximum publicity and minimum critical scrutiny. Questions about the accuracy or reliability of these numbers, about sample size, techniques, and methodological assumptions, have seldom been asked. Had these questions been raised, the weakness of the claims would have been obvious to numerate audiences, since figures were typically generated by asking managers to estimate the number of employees they thought engaged in time theft, then converting lost time into lost dollar amounts. In many cases, the sample of managers was too small and the firms were too unrepresentative to persuade those versed in positivist or quantitative methodology. Still, at this stage in the process academic experts were not the primary target audience, and consequently, the scientific accuracy of the surveys was not a central issue.

Therefore, we see a range of claims quantifying time theft, with the numbers escalating annually, faithfully reported in the business press. Time theft was deemed to cost \$120 billion a year in 1982²¹ and a mere \$15 billion in Canada.²² It rose to \$137 billion the next year, then to \$160 billion.²³ The escalation continued, with figures set at \$161 billion, \$170 billion,

Vancouver Sun (9 July 1984) B8 [hereinafter "Survey Finds"].

¹⁹ "HR Focus" (1990) 67:3 Personnel 1 at 5; "Time Bandits" *Ottawa Business Life* (September 1987) 14 at 14; L. Duncan, "Five Ways to Stop a Thief" (1989) 50:1 Supervision 8 at 8; "Cost of Being Organizationally Impaired" (1989) 50:2 Supervision 17 at 17; B. Sunoo, "The Employee may be Loafing. Can you tell? Should you care?" (1996) 75 Personnel J. 54 at 56; and "Goofing Off" *Montreal Gazette* (24 July 1989) B7.

²⁰ "Survey Finds", supra note 18 [emphasis added].

²¹ H. Swartz, "The \$120 Billion-a-Year Theft of Time" *Dun's Business Month* 120 (October 1982) 75 at 75.

²² "Survey Finds", supra note 18.

²³ Half, supra note 2 at 80; "Time Theft put at \$160 Billion" *Automotive News* (3 February 1986) 201 at 210.

then at \$200 billion.²⁴ By the end of the 1980s, theft of time had been constructed as both a fact and a serious social problem. A virtual epidemic of undisciplined, lazy, goof-off employees was loose in the North American workplace. These deviants, though not yet criminals, were sapping the nation's productivity (the implicit/explicit comparison group being the Asian, particularly the Japanese worker), making the corporation uncompetitive and draining away profits.

III. THE SOLUTIONS: DISCIPLINING THROUGH KNOWLEDGE, TECHNOLOGY, AND LAW

A. *Disciplining Through Knowledge*

Once the offence is named, the cost of its consequences tallied, and minimally established as fact and problem, it is incumbent on claim makers to offer remedies. The solutions put forth change depending on the analytical model that is employed, which in turn, varies by discipline. Experts who see employee ignorance as the primary cause of time theft recommend remedies based on educating employees. Those who attribute it to fraud or dishonesty, who constitute the venal, profit-maximizing employee, tend to favour intrusive technological surveillance combined with criminal penalties.

Economic and political interests are not unimportant; those in the business of selling solutions usually advocate remedies that benefit their discipline, company, or consulting firm.²⁵ The underfunding of universities and the allied, constant pressure on academics to justify their existence through alliances with the private sector makes this a win-win situation. Professors can supplement their salaries by selling knowledge to the private sector and by doing so prove, to their employer and themselves, the legitimacy of their discipline, since marketability is the supreme arbiter of worth. Those outside the academy, the legions of freelance consultants in

²⁴“Time Theft Hit \$161 Billion in ‘85” (1986) 15 *Mgmt. World* 5 at 5; “Wasted Hours are Said to Cost US \$170 Billion” (1987) 3:1 *OA Off. Mgmt. & Automation* 10 at 10; and “‘Time Theives’ Cost US Business \$200 Billion” (1998) 4:9 *OA Off. Mgmt. & Automation* 10 at 10.

²⁵ I am not suggesting the motivation is necessarily dishonest or venal. Just as ministers see sin as primary cause, and conversion and confession as remedies of choice, so lawyers see legal remedies, psychologists look to the individual employee, and sociologists to the work group and culture. Professionals apply the lens of their own discipline to diagnose the cause of social problems they simultaneously study and constitute. Similarly, those in the business of developing and selling screening tests or monitoring technologies can guilelessly recommend remedies from which they will profit because they sincerely believe these are the best problem-solving mechanisms available.

“the knowledge economy,” are also able to secure a modest—or immodest—living by producing, selling, and promoting remedies. Addressing the problems of the rich and powerful tends to be rewarding.

The initial task is usually to identify the problem group and to distinguish the culpable from the non-culpable employees. This requires the development of screening devices and tests to ferret out potential deviants since it is much more expensive to dismiss employees than it is not to hire them in the first place. Consequently, instruments such as the Preemployment Integrity Test, designed to predict “counterproductive employee behaviour,” have been developed. The London House Personnel Selection Inventory (PSI), for example, identifies and weeds out problem employees. In a sample of ninety-five job applicants, the authors report that the PSI accurately predicted theft of time, theft of merchandise, and “poor job performance.” Latent time thieves, it turns out, score high on character traits such as “general moral permissiveness.”²⁶ Urine tests and compulsory DNA samples seem to represent the logical next step.

However, since screening devices inevitably let some miscreants through, more is required. Employers must use knowledge to get inside the heads of employees, to persuade them to discipline and shame themselves. Experts who favour liberal remedies tell employers “to bring employees onside” to educate or persuade them that theft of time is wrong and that it constitutes a serious breach of the employer-employee contract. Responsible employers are advised to develop fair, consistently enforced time-use policies in order to inculcate a change in corporate attitude about time. This will purportedly improve morale which will, in turn, “increase productivity and recapture profits.”²⁷ Along the same lines, employers are advised to design programs and activities to improve employee performance because, “most employees are... unaware that their behaviour is inappropriate. ...[since] time-wasting habits... reflect the way an employee has behaved all his [or her] life.”²⁸ To underline the disciplinary message, employees should be provided with facts—numbers, of course—on the cost of “loafing.” Also, employees should be asked to take “voluntary” tests, such as Sunoo’s “How Many Hours Have *You* Wasted?” which aim to get employees to monitor their own on-the-job behaviour.

²⁶ See e.g. M. Boye & A. Wasserman, “Predicting Counter-productivity among Drug Store Applicants” (1996) 10:3 J. of Bus. & Psychol. 337-39.

²⁷ “Time Theft”, *supra* note 16 at 32.

²⁸ K. Blair, N. Snyder & T. Arndt, “Breaking the Bad Habits Behind Time Theft” (1990) 40 Bus. (Atlanta, GA) 31 at 31.

Thus employees are asked to write down how many hours per week they spend “staring out the window, Christmas shopping, taking coffee breaks, smoking cigarettes, showing off your vacation photos, writing letters to Grandma, or surfing *Penthouse’s* web site.”²⁹ Interestingly, employees are seldom asked to record the number of hours they spend taking such tests. Less liberal solutions include keeping employees on edge through constant job insecurity and periodic downsizing. As one expert writes, “when people are afraid of losing their jobs they work harder and steal less time.”³⁰ However, job insecurity is also identified as a double-edged sword, causing more time theft than it cures. One article in *Personnel Journal*,³¹ a resource for human relations professionals, makes the point that employees are more likely to steal time by “loafing” if too many human relations professionals have been laid off.

B. *Disciplining Through Technology*

Employee monitoring and surveillance, both covert and overt, have become the most common means of disciplining the work force, even though the intrusiveness, ubiquity and punitiveness of this practice varies widely depending on the sector and level of the employee. Technology supplements, rather than replaces, remedies devised by social science and law. In the name of productivity, the modern corporate employer has adopted computer-based technologies that make the scenarios of Orwell’s *1984* look optimistic and the principles of Bentham’s Panopticon look lax. In the quest for the “perfect,” that is, maximally productive, employee, engineering and technological expertise from the natural and applied sciences have been combined with theories of human motivation and conformity generated by the social sciences. Physical, sociological, and psychological resistance are enemies to be defeated. If human beings cannot yet be eliminated completely from the work process, which has historically been the ultimate goal, they must be rendered at least as efficient as machines.

Consequently, businesses are ceaselessly on the lookout for slackers and thieves, for any and all forms of employee resistance. In the quest to achieve the compliant workforce and the docile subject, victory is never complete. Externally, employee protection laws and culturally generated

²⁹ Sunoo, *supra* note 19 at 57.

³⁰ Half, *supra* note 2 at 80.

³¹ Sunoo, *supra* note 19 at 56.

attitudes of entitlement are a problem. Internally, every improvement, every change, can have unanticipated consequences, as employees constantly find ways to use technologies designed to maximize productivity to their own benefit, turning these technologies against the employer. The struggle to eliminate unauthorized uses of computer technology is a case in point.

In the 1980s employers were primarily concerned that software, such as word processors, could be employed to further the private agendas of employees. "Is your Operator Secretly Writing Romances?" asks one article.³² It remains difficult to distinguish, by visual surveillance alone, between workers doing legitimate computer-based tasks and those following their own agendas.³³ However the real subversive power of new technologies emerged with the development of cyberspace, electronic mail, the World Wide Web, and the internet. Businesses became obsessed by the time theft potential of internet surfing and electronic chat rooms, by employees' consulting "inappropriate" web sites or writing personal letters on office electronic mail systems. Added to time theft was the threat of lawsuits should employees visit pornographic web sites or use electronic mail systems to harass fellow employees. In a landmark 1995 U.S. decision, Chevron paid \$2 million to settle a suit wherein one employee harassed another via corporate electronic mail. Still, access to these tools cannot be denied without compromising productivity; employees at a certain level of seniority need internet access and freedom of movement online to operate efficiently. Thus, law firms now urge companies to get employees to sign "voluntary" consent forms allowing the employer to intercept and monitor all electronic mail and internet activity.³⁴ With or without employee consent, 45 per cent of American companies now monitor all electronic communication.³⁵ Companies are also "cracking down on free Webmail," forbidding employees from subscribing to free services such as Hotmail and Yahoo.³⁶ The fact that employees *think* they are getting away with something is sufficient reason to ban them from using these services, even though in reality, with surveillance, monitoring, and storage on magnetic

³² P. Gassaway, "Theft of Computer Time" (1983) 44 *Office Admin. & Automation* 41 at 41.

³³ See *Calgary Herald* (18 January 1997) 11.

³⁴ *Ibid.*

³⁵ M. MacMillan, "Monitor Employees With Caution, Warns CIPS: Legal Issues Leave Some Employers With Little Choice, But Too Much Surveillance May be Bad for Business" (2000) 26 *Compu. Can.* 20.

³⁶ *Ibid.*

tape of all electronic activity, nothing is unrecoverable once inscribed online. Relations of deference and authority are thereby reinforced alongside efficiency and productivity.

Inappropriate internet use, however, is only an issue for middle and upper-level employees, still disproportionately male, middle-class, and white. At lower levels, in office, shop, and factory, internet access is a dream, on-the-job surveillance is constant, intense, and intrusive. Computer monitoring through automated time-and-attendance video display systems record employees' in-and-out times, compute hours worked, and individual and collective levels of productivity. The systems also generate lists of "job-costing alternatives," ways of improving efficiency by eliminating particular tasks and, subsequently, people.³⁷ Active badge or keycard systems must be swiped when employees arrive, leave, go to lunch or visit the washroom. In the electronic office, every keystroke is counted, every phone call recorded, and every "unproductive" moment assessed. Employee performance records, generated by measuring how long each employee takes to handle an order or complaint compared against the norms or targets produced by efficiency experts, are compiled every day, week, or month. Passive monitoring is supplemented by eavesdropping. In true Panopticon fashion, the employee never knows whether his or her supervisor is listening.

The creation of what amounts to nationwide electronic sweatshops, while profitable for those employing the technology, has been disastrous for many employees. Some of the most common responses to surveillance have been studied, with experts paying particular attention to those that threaten productivity or increase costs.

Overall, nervous breakdowns increase with the level of surveillance, while general health deteriorates. Fatigue or exhaustion, depression, apathy, stress, anxiety, pain in shoulders and wrists, stomach and back, indigestion, nausea, and sleep disturbances are common.³⁸ A workplace "syndrome" has been legitimized by the name "bathroom-break harassment," defined as the reluctance to take bathroom breaks for fear of losing one's job. The designation honours a United Airlines employee who was disciplined in 1996 for overly long bathroom breaks—a flight reservationist is allowed a total of twelve minutes to attend to personal needs over a seven and a half hour shift. Indeed, there is no federally mandated right to rest periods at work in the United States. In fact,

³⁷ See J. Latshaw, "On Time Recorders" (1997) 14 *Off. Sys.* 36 at 36.

³⁸ J.M. Mishra & S.M. Crampton, "Employee Monitoring: Privacy in the Workplace?" (1969) 63 *S.A.M. Adv. Mgmt. J.* 3 at 6.

“employers often consider the time a worker spends urinating as ‘stolen’ time.”³⁹

Old-fashioned spying techniques have not disappeared: informants or stooge employees are still planted inside firms to pose as employees and infiltrate work groups, gathering inside information on the personal lives, habits, and sins of co-workers. Covert surveillance is employed to deter “time or product theft” in a variety of sites. Occupations that historically enjoyed relative workplace autonomy, such as longshoremen, truck drivers and police officers, are particularly targeted.⁴⁰ Phone taps permit employers to eavesdrop on employees’ telephone calls. “Snitch lines”—confidential, toll-free telephone lines—are set up to encourage employees to report, anonymously, on the time-wasting, time-stealing, drug-taking, or otherwise nefarious activities of co-workers.⁴¹ Technological and aural surveillance is frequently supplemented by video surveillance to stamp out nonproductive, venal behaviour such as “fooling around” on the job or “horseplay.”⁴²

Technological “creep” abounds as surveillance tools developed for other purposes in other institutional sites are imported into the workplace. Active badge systems, for example, originally designed to track the movements of convicted criminals on house arrest, are now common in factories and warehouses. Such systems let supervisors know the exact location of every employee beyond visual surveillance at any given time. “Currently, as many as 26 million workers in the United States are monitored in their jobs By the end of the decade, as many as 30 million people may be”⁴³

C. *Disciplining Through Law*

Disciplining through criminal law is typically the last stage in the crime-creation process, a stage that more and more “social problems” eventually reach as the modern state becomes ever more dependent on

³⁹ M. Linder & I. Nygaard, *Void Where Prohibited: Rest Breaks and the Right to Urinate on Company Time* (New York: Cornell University Press, 1998) at 10.

⁴⁰ See B. Brandman, “Don’t Be Taken for a Ride” (1994) 35 *Transp. & Dist.* 100 at 100; R. Ericson & K. Haggerty, *Policing the Risk Society* (Toronto: University of Toronto Press, 1997). In all jobs, employees on sick leave are particularly likely to be targeted.

⁴¹ Mishra & Crampton, *supra* note 38 at 3.

⁴² *Ibid.* at 4.

⁴³ *Ibid.*

coercion rather than consent.⁴⁴ In much of the developed world, theft of time, in and of itself, is still not a criminal offence. Theft of time is a legitimate reason for dismissal; employers can fire employees deemed guilty of theft of time for cause. Canadian law is typical, treating theft or “misuse” of time as analogous to theft of company property, although no specific law proscribes it.

Case law is inconsistent. In *Taylor v. Sears Canada Inc.*,⁴⁵ the court upheld the firing of an employee for taking longer than authorized daytime breaks who then claimed overtime when he did not finish his deliveries on time. However, the British Columbia Supreme Court rejected an employer’s attempt to dismiss an employee for cause by claiming that this was analogous to theft from the employer.⁴⁶ On the other hand, the Canadian *Charter of Rights and Freedoms*⁴⁷ purportedly protects privacy rights, but its provisions on search and seizure only cover government, not private-sector employees. Quebec is the only province with comprehensive individual privacy legislation enshrined in Quebec’s *Charter of Human Rights and Freedoms*.⁴⁸ Elsewhere, legislation is ad hoc and focused on the public sector.⁴⁹

The United States is the nation to watch because of its status as global business leader, its mammoth economic power and its worldwide ideological clout. At the present time, with the exception of privacy law, most of the relevant American case law is state-based rather than federal. In fact, the virtual absence of legal provisions protecting the employee from arbitrary actions by the employer or, on the positive side, establishing employees’ rights, is striking. To achieve the “efficient,” “productive” workforce, anything goes; the right of capital to act in the interests of profit maximization is uncontested. Setting limits on employers is seen as going

⁴⁴ However, the process is not necessarily linear. Which acts and practices are designated criminal and which are not is complex and overdetermined, varying much too widely across time, culture, and nation-state, to permit *a priori* theoretical generalizations. Empirical investigation on a case-by-case basis is the only way to sort out the key factors at play when analyzing any particular issue.

⁴⁵ (1990), 95 N.S.R.(2d) 170 (S.C.).

⁴⁶ *Richardson v. Davis Wire Industries Ltd.* (1997), 28 C.C.E.L. (2d) 101 (B.C. S.C.).

⁴⁷ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s.8.

⁴⁸ S.Q. 1982 c. 61.

⁴⁹ See D.J.M. Brown & D. M. Beatty, *Canadian Labour Arbitration*, 3d ed. (Aurora: Canada Law Book, 1994); M.G. Sherrard, “Workplace Searches and Surveillance versus the Employee’s Right to Privacy” (1999) 48 UNB L.J. 283; and D. Johnston, S. Handa & C. Morgan, *Cyberlaw: What you Need to Know About Doing Business Online* (Toronto: Stoddart, 1997).

against efficiency. The discursive privilege of capital in the United States is so strong at this time that its claims, goals, and needs easily trump rival claims. In the most basic way, capital—the employer class—defines meaning, and, consequently, practice and law in the workplace. Therefore, to employers, legislators and, often, employees, laws extending the rights of capital (the legitimate defenders of efficiency and productivity) make sense, while those restricting capital do not. Who could oppose efficiency? It becomes a non-choice, a classic no-brainer.⁵⁰

Thus, practical and economic reasons, not worker resistance or legislative reluctance, explain the scarcity of criminal laws against theft of time. North American employers are generally very familiar with the practical drawbacks of the criminal justice process. Literature on white-collar crime abounds with instructive case studies, showing that backlogged court dockets, year-long delays, and endless remands and minuscule sanctions are common.⁵¹ The publicity attending criminal law is another disincentive. No corporation wants to be portrayed as unable to control its workforce or staffed by “thieves.” However, if business assessments of the utility of criminal law change, there is every reason to expect that, barring a major shift in the ideological, economic and political landscape and balance of power, legislation would follow.

The major federal legislation defending, however obliquely, the rights, privacy, and property of workers is found in the Fourth Amendment of the U.S. Constitution, which guarantees security of person and property against “unreasonable searches and seizures.”⁵² However, this protection only applies to infringements by government actors, such as police forces or the FBI, and it does not cover arbitrary acts by private employers. Thus, searches of desks, lockers, purses, and automobiles have been declared “reasonable” under the *National Labor Relations Act*⁵³ and employees have no right to demand an attorney or resist interrogation by employers or their

⁵⁰ The situation is somewhat different in the other major global power bloc, the European Union. Under the *European Data Protection Directive*, which came into effect in 1998, European employees have wider privacy protection than employers in Canada or the United States.

⁵¹ See e.g. H. Edelhertz, *The Nature, Impact and Prosecution of White-Collar Crime* (Washington: National Institute for Law Enforcement and Criminal Justice, 1970); G. Green, *Occupational Crime* (Chicago: Nelson-Hall, 1994); and L. Snider, *Bad Business: Corporate Crime in Canada* (Toronto: Nelson, 1993).

⁵² U.S. Const. Amend. IV, § 1.

⁵³ See M.W. Finkin, *Privacy in Employment Law* (Washington: BNA Books, 1995) at 110.

representatives.⁵⁴ Moreover, Fourth Amendment protections only apply where a person has “a reasonable expectation of privacy” and no reasonable person, certainly not one familiar with the jurisprudence on this issue, would expect privacy in the American workplace.⁵⁵

In 1986, legislation was introduced to bring privacy protection into the electronic age. The *Electronic Communications Privacy Act*,⁵⁶ put forth by the right-leaning Reagan administration, prohibits the intentional or willful interception, accession, disclosure, or use of wire, oral or electronic communication. However, business resistance was fierce; in response, the Reagan administration introduced three types of exemptions. First, those who own the network service providing the communication (typically the employer) are exempted.⁵⁷ Second, no “business-related communications” are covered.⁵⁸ Third, the legislation is null and void where an employee gives “express or implied consent” to interception or disclosure, surveillance, or monitoring.⁵⁹ When the Democratic party took power federally in 1990, an attempt was made to strengthen this legislation and provide meaningful penalties for violators. A bill titled, *The Privacy for Consumers and Workers Act*, was introduced by Senator Paul Simon and Representative Pat Willams in 1991. However, the bill fell victim to heavy corporate lobbying and was never passed. Today, employers can only be called to account, through federal law, if they violate the collective right to organize (won during the Depression) or the prohibitions on discrimination (won during civil rights and feminist struggles in the 1960s and 1970s). Since 1986 electronic surveillance of union activities in the workplace is also forbidden. However, with union membership in the United States at an all-time low, decimated throughout the 1980s and 1990s⁶⁰ by downsizing,

⁵⁴ *Ibid.* at 102.

⁵⁵ See e.g. W.L. Stasell, “How Far is Boss’s Reach?” (2000) 86 A.B.A.J. 32.

⁵⁶ 18 U.S.C.A. § 2511 (1986).

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ See D.C. Yamada, “Voices from the Cubicle: Protecting and Encouraging Private Employee Speech in the Post-Industrial Workplace” (1998) 19 Berkeley J. Emp. & Lab. L. 1 at 4. Union membership in the United States has fallen to 10 per cent of the non-agricultural private sector workforce. It is much higher in Canada and most European countries, where a third to half of all workers typically belong to unions. However, even in these countries unionization is increasingly concentrated in the public, not private, sector.

outsourcing, and so-called right-to-work laws, this exemption becomes more meaningless every year.⁶¹

At the state level, two cases illustrate the implications of the rights-free workplace and showcase the legal checks and balances available to the employee. I make no claim that these are representative or typical cases, since many, perhaps even most, fired employees do not know there are any remedies available to them, or they lack the money, motivation, or both, to fight the employer—an expensive, David-and-Goliath encounter even if they win. The cases most likely to be documented and accessible, and therefore, available for use by either side in future battles, originate in unionized workplaces, where the union has taken the risk and paid the costs of litigation. Industrialized, relatively prosperous states with well-established labour codes and histories of resistance are also well-represented in court records. However, the vast majority of employees dismissed for time theft most likely accept what they see as inevitable (and sometimes legitimate), and never appear on the records.

First, a non-unionized case, *Norton v. Sam's Club*,⁶² heard in the relatively liberal state of New York. The manager of Sam's Club, a division of Wal-Mart, trailed an employee on his sales calls, and subsequently accused him of taking approximately an hour for lunch with co-workers while claiming only thirty minutes on his time sheet. The employee, Norton, was fired for theft of time. Norton admitted taking "a long time" at lunch that day, but claimed extenuating circumstances because he had just learned that his father was terminally ill. Co-workers took him to lunch to cheer him up. Since New York has no legislation prohibiting employers from firing employees for stealing time, Norton's only redress was via federal legislation on age discrimination. Norton, who was fifty-three at the time, sued Sam's Club/Wal-mart for age discrimination. The case was heard before a jury, and Norton won. Wal-Mart was ordered to give him back his job and pay back his lost wages. However, a huge, multinational, deep-pocket employer such as Wal-Mart, has endless resources to contest any employee victory. Wal-Mart appealed and the decision was overturned.

A unionized workplace case was heard in California around the same time as the *Norton* case. In *California School Employees' Association*

⁶¹ Common law provisions have proved equally weak. See Stasell, *supra* note 55 at 32. The author notes that "employees have very few privacy rights in the workplace" and "firing employees for online activity has typically been upheld" when challenged in court.

⁶² 145 F.3d 114 (2d Cir. 1998).

v. *De Anza College*,⁶³ the employer, a California college, planted an undercover police officer among custodians who were suspected of stealing computers. When no evidence of theft was discovered, the custodians were fired for theft of time—for coming in late, leaving early, drinking, and sleeping on the job. The chancellor of the college said that, “Time was embezzled, and time costs money.”⁶⁴ The custodians’ union filed a counterclaim against the college, accusing a manager of short-staffing and inadequate provisioning, arguing that they had never been provided with sufficient supplies to do the job. The defendants were successful and the court ordered the custodians reinstated.

IV. CONCLUSION

It is ironic that theft of time has emerged as a social problem at a time when employers are increasingly stealing time from employees. Businesses routinely demand unpaid overtime, they expect white-collar employees to appear at corporate events, or oblige executives to donate evenings and weekends raising money for corporate charities. Employees who value their job and chances for promotion know enough to show up. In journalism and social service, many firms expect prospective employees to serve unpaid internships, or prove themselves as volunteers, sometimes for months or years, before being considered for paid employment or full-time jobs. Also, the average work week in North America is getting ever longer,⁶⁵ electronic mail demands instant response, and cell phones mean no employee is ever really out of reach, off limits, or off the job.

While some salaried employees in managerial and professional positions put in ninety hour weeks and more, the wage worker may be even

⁶³ Reported in K. Petersen, “Custodians’ Union Sues De Anza College Board” *Cupertino Courier* (22 October 1997).

⁶⁴ *Ibid.*

⁶⁵ See “Overtime Rises, Making Fatigue an Issue” *New York Times* (17 September 2000) [hereinafter “Overtime Rises”]. Figures from the Bureau of Labor Statistics show that the average employee in the United States works two hours more per week than in 1982. Canada is in the middle—as is often the case—with shorter average work weeks than in the United States, but longer than in Britain, Germany, or France. However, the average in this case is a highly unrepresentative measure because it does not take into account the huge increase in part-time workers, many of them women, since 1982. The most cursory survey in any workplace immediately shows an average work week of forty-five to sixty hours, peaking at particular times of year and varying by employee. The well-documented “workaholic” may regularly put in a ninety hour week, while the single mother doing a second (unpaid) shift in the home may “only” do forty hours.

worse off. In the United States, under the 1938 *Fair Labor Standards Act*,⁶⁶ those classified as workers are not allowed to refuse overtime. While this time is compensated, it is often anything but voluntary. A lineman employed by Central Maine Power in 1999, for example, was killed when he grasped a 7200 volt cable without first putting on his insulating gloves. The man had worked two and a half days with a total of five hours off; every time he went home to bed, he was called back to work. Had he refused, he certainly would have been disciplined, and might have been fired. The coroner's inquest identified fatigue as a cause of death.⁶⁷ Firefighters in Connecticut took a different approach to lighten long hours of work. They launched a case challenging mandatory overtime as unconstitutional under the Thirteenth Amendment, the provision that bans slavery.⁶⁸ Ultimately, however, the firefighters lost.

Theft of time by employers, on the other hand, is neither disciplined nor criminalized. Quite the reverse; in the fall of 2000, legislators in the United States introduced a bill to prevent information economy workers, including computer network analysts, database administrators, technology workers, sales personnel and the like, from demanding or receiving overtime pay. In the province of Ontario, the revised *Employment Standards Act 2000*,⁶⁹ which came into effect on September 4, 2001, extends, via the employees' agreement, the maximum work week from forty-eight to sixty hours. Also, overtime pay has been decreased by allowing employers to average it over a maximum four week period⁷⁰ and vacation days can now be assigned at the employers' convenience.⁷¹ Although an employees' agreement is required for long hours of work and averaging overtime pay entitlements, few employees will say no to their employers. At the same time, unionized shops are forced to post instructions in every workplace telling employees how to dissolve unions.⁷² However, there is no reciprocal provision for non-unionized workplaces to post instructions telling employees how to unionize. Like much similar legislation, the *Employment Standards Act 2000* is justified as modern, necessary, and efficient, and seen

⁶⁶ 29 U.S.C.A. § 413 (1938).

⁶⁷ "Overtime Rises", *supra* note 65.

⁶⁸ *Ibid.*

⁶⁹ S.O. 2000 c. 41, s. 17(2)(b).

⁷⁰ *Ibid.*, s. 22(2).

⁷¹ *Ibid.*, s. 34.

⁷² *Ibid.*, s. 2.

as an Act that will allow Ontario employers to compete in the global economy.

While the drive towards ever greater economies of production was predicted long ago by Karl Marx and other nineteenth-century theorists, the extent, speed, relentlessness, and success of this project was not. Disciplinary demands have been imperialistic, creeping up the job hierarchy from shop floor, to office, to the executive suite, and into every public and private institution and sector. Even senior management now faces demands for more disciplined, intensive performance, more transparency, and accountability. Nor was the unique role that social science disciplines would come to play foreseen. For many theorists of modernity, knowledge was a tool of enlightenment which would set workers free. Instead, disciplines have forged alliances with capital to produce technologies, assign meaning and attach particular practices to concepts of productivity and efficiency, thereby increasing expectation and performance demands. The knowledge claims of social science and law have penetrated deep into the psyche, changing habits of mind, thought, language, and culture in ways that transform the meaning of “exploitation” and “consent.” The result is that, to a considerable extent, North American employees constitute their own domination. This does not make the domination any less real, nor does it mean that employees reap equal benefits from domination. The costs of higher productivity, including surveillance, less freedom of movement and thought, and escalating and unceasing demands for more physical and mental effort, are primarily borne by employees, the 80 to 90 per cent of the population that is dependent on wages. The benefits of productivity, namely prestige and power, stock options, bonuses, private yachts, and jets, are disproportionately distributed among elites who sit atop corporate hierarchies in the developed world and, to a lesser degree, their counterparts in politics and academia.⁷³

Collective and positive resistance to the disciplinary spiral in the workplace has been surprisingly weak. As explored throughout this commentary, when progress and modernity are defined through concepts such as productivity and efficiency, allied with science and legitimized through law, resistance is difficult to conceptualize, let alone build. As noted above, the fact that disciplinary demands have not been confined to those at the bottom of the class, race, and gender hierarchy, although they are most intense and punitive there, and that material benefits have not gone exclusively to those at the top of corporate hierarchies, even though

⁷³ See Yalnitzian, *supra* note 8.

these elites have reaped a disproportionate share, has also produced widespread acquiescence, if not consent. Thus, resistance through law has been couched, primarily, in negative and individualistic terms, through legalizing the right to resist surveillance through privacy law, rather than, for example, formulating a charter of employee rights. The discourse of privacy leaves the primacy of private ownership unchallenged, never interrogating its status as a master claim, one that confers all power *except* that which can be wrestled away through special, exceptional claims, on employers. To those who cannot make ownership claims, it allocates a limited and almost indefensible space. If you are not wasting time or doing something you should not be doing, why do you object to urine tests, surveillance cameras, and time-monitoring devices? Are you in favour of malingering, theft, or inefficiency?

The emergence of theft of time, as concept, practice, and law, is the latest development in an intense, four hundred-year-old struggle to transform the unruly feudal peasant into an efficient, profit-maximizing unit of production.⁷⁴ Theft of time is but the most recent example of the intensification of disciplinary demands in modern societies. The ultimate goal is to create an employee who will be resigned, if not content, because happy employees are more productive; intelligent (but only to a narrow, employer-prescribed end) untiring; compliant; loyal; respectful, and grateful for a job. At the end of the day, the happy employee will turn into the happy consumer, buying the products and services on offer and defining his or her identity through these goods. Through science, technology, and law this process has gone from strength to strength. To create alternative ways of seeing, acting, and doing, would require challenging all components in this disciplinary spiral.

⁷⁴ See histories in P. Linebaugh, "Karl Marx, The Theft of Wood and Working Class Composition" in T. Platt & P. Takagi, eds., *Crime and Social Justice* (New York: Macmillan, 1981); J. Ditton, "Learning to 'Fiddle' Customers: An Essay on the Organized Production of Part-Time Theft" (1977) 4 *Soc. of Work & Occupations* 427; C. Becker, "Property in the Workplace: Labor, Capital and Crime in the 18th Century British Woolen and Worsted Industry" (1983) 69 *Va. L. Rev.* 1487; and J. Ditton, "Perks, Pilferage and the Fiddle: The Historical Structure of Invisible Wages" (1977) 4 *Theory & Soc.* 39.