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Consenting Employees: Workplace Privacy and the Role of Consent

*Steven L. Willborn**

Privacy is about secrets. It protects our ability to keep important parts of our lives secret. But even more than secrecy, privacy is about autonomy. It protects our ability to *choose* which parts of our lives to disclose to others. You would invade my privacy if you analyzed my DNA, unless I gave you permission. You would invade my privacy if you examined my e-mails at work, unless I gave you permission. You would invade my privacy if you inquired too closely into my sexuality, unless I extended an invitation.

One way to think about this is to view consent as one of the key limits on privacy. There is much in modern life, and especially in modern work life, that is not private at all. But even within the fairly limited realm of what privacy ordinarily protects, the law will recognize less protection, if the individual agrees. The possibility of consent provides a second, individualized, and narrower limit to what the law protects as privacy.¹

But the role of consent in privacy law is not merely, or even principally, to serve as a limit. Consent is also an integral part of what we understand privacy to be and one that makes important contributions to the value of privacy in modern society. Consent is a crucial component of privacy that empowers individuals and affirms human dignity. It is consent that permits us to receive and express intimacy. It is consent that regulates our respect for the privacy of others. It is consent that bestows on individuals, rather

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* Dean & Schmoker Professor of Law, University of Nebraska College of Law. My thinking on this topic has changed considerably based on feedback I received during presentations at the University of Nebraska and LSU. I received especially valuable comments from Bill Corbett, Rick Edwards, John Gradwohl, Christine Jolls, Richard Moberly, Ramona Paetzold, Bob Schopp, Jane Willborn and Bob Works. I would also like to thank the editors of the Louisiana Law Review for the invitation that gave me cause to focus on this interesting issue, and especially Sandra K. Varnado who did a spectacular job in organizing this symposium. Finally, Stacey Hines provided solid and valuable research assistance.

1. The focus of this paper is on consent to what would otherwise be privacy violations. It certainly is possible to view consent more broadly so that it can also expand privacy protections. *Cf. Rulon-Miller v. International Business Machine Corp.*, 208 Cal. Rptr. 524 (Cal. Ct. App. 1984). But that is not the topic of this article.

than society, the power to draw the precise boundaries around their own privacy.²

Privacy does protect our secrets. But it functions primarily by allocating authority over those secrets to individuals. Individuals can continue to protect those secrets, or they can consent to their release. Both privacy-as-secrets and consent mediate the boundary between society and the individual. But consent, even more than the concept of privacy-as-secrets, bows to the complexities of modern life and affirms the power of individuals to shape their own identities, their own lives.

The importance of consent in privacy law creates special problems in the workplace. Everyone agrees that consent is a difficult and compromised concept in employment law, although the reasons vary. Some couch the problems in the rhetoric of power: employee consent is suspect because employees are weak.³ Others talk about various types of market imperfections that compromise employee consent, such as asymmetric information or free rider issues.⁴ Still others point to behavioral biases and heuristics that taint employee consent.⁵ But the bottom line is the same: consent within the employment relationship is compromised and must be regarded with at least some skepticism.

Thus, the tension that is the subject of this article. On the one hand, consent is central to privacy in fundamental ways. On the other hand, consent in the workplace is suspect and compromised.

I will begin in Section I by discussing in more detail the central role of consent in American privacy law. In Section II, I will analyze the current state of the law on employee consent to privacy violations. In Section III, I will suggest several guidelines for thinking about the appropriate role for employee consent.

2. I have come to agree with Peter Westen who claims that consent is a "major concept by which we organize and express our normative judgments of the world." Peter Westen, *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct* 293–94 (2004). As a result, it ranks in importance with concepts such as justice, equality, freedom, property and responsibility. *Id.* at 293.

3. See Matthew W. Finkin et al., *Legal Protection for the Individual Employee* 2 (1989) ("[A]n appropriate function for [employment] law [is] to aid the weaker party").

4. See Steven L. Willborn et al., *Employment Law: Cases and Materials* 5–9 (3rd ed. 2002).

5. See Cass R. Sunstein, *Switching the Default Rule*, 77 N.Y.U. L. Rev. 106 (2002).

I. PRIVACY AND CONSENT

Ruth Gavison provides a useful starting point for thinking about privacy and consent. In a pathbreaking article, she identified accessibility as the key element of privacy. Thus, perfect privacy would exist when there was absolutely no accessibility: when no one has any information about a person (secrecy), no one pays any attention to her (anonymity), and no one has physical access to her (solitude).⁶

This is a useful starting point because it captures the situations we associate with privacy and excludes others that might fall within alternative definitions. Thus, the definition is sufficiently broad to cover the situations I describe in the next section which invoke privacy concerns. Having information about another's DNA or HIV status raises concern about secrecy, while seeing Steve Willborn without clothes (yes, that is about to come) would raise concern about both anonymity and solitude. At the same time, Gavison's definition is sufficiently narrow and precise to exclude situations that might be covered by other, too-broad definitions. Thus, as Gavison points out, thinking of privacy as "being let alone" would cover things like requiring people to pay taxes or join the army.⁷ Situations like these may well raise issues relating to freedom and liberty, but they do not fit very well into common or legal conceptions of privacy invasions.

Perfect privacy is, obviously, not a very desirable state. Neither would its converse—a state of perfect lack of privacy—be very desirable. We know from their reaction to paparazzi that even the most public and publicity-craving people do not relish situations in which everything is known about them (no secrecy), everything they do is known (no anonymity), and they are constantly observed (no solitude).⁸ The interesting questions arise between these two states when we attempt to identify the precise points on this continuum where the law ought to provide protection. (Figure 1) One contested place on the continuum identifies social protection of privacy. At what point, *absent consent*, would the law provide protection? The answer to this question will vary depending on the particular type of privacy (sexual, medical, educational records), the particular reasons for

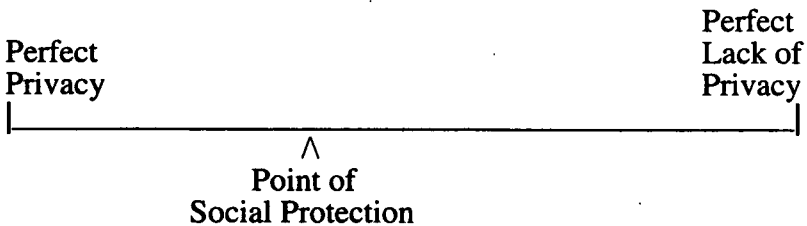
6. Ruth Gavison, *Privacy and the Limits of Law*, 89 Yale L.J. 421, 428 (1980).

7. *Id.* at 437–38.

8. *Id.* at 443. See Americas Clampdown on Hollywood Paparazzi, BBC News, <http://news.bbc.co.uk/1/hi/world/americas/245760.stm> (Jan. 1, 1999) (describing California law supported by Hollywood celebrities which makes certain paparazzi activities a misdemeanor) (last visited April 15, 2006).

thinking that privacy might be warranted (freedom from ridicule, promoting autonomy, promoting civility), the particular category of privacy invasion at issue (intrusion on seclusion or solitude, public disclosure of private facts, false light, appropriation), the particular culture for which the rules are developed, and many other factors. The bulk of the literature on privacy discusses the location of this point.⁹ This is an interesting issue, of course, but not the topic of this paper. This paper accepts the point of social protection wherever it might be.

Figure 1



The topic of this paper is about the space to the left of this point.¹⁰ Thus, the paper assumes that there is presumptive social protection for the privacy at issue. But just what is it that is protected in that space? It is almost always incorrect to think that there is something in that space that is so secret that society forbids its disclosure.¹¹ Instead, what is protected in the space is the

9. See, e.g., Gavison, *supra* note 6; Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 Cal. L. Rev. 957 (1989); Louis Henken, *Privacy and Autonomy*, 74 Columbia L. Rev. 1410 (1974); William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383 (1960); Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). Other papers in this symposium also focus on this issue. See Catherine L. Fisk, *Privacy, Power & Humiliation in the Workplace: The Problem of Appearance Regulation*, 66 La. L. Rev. 1111 (2006); Rafael Gely & Leonard Bierman, *Workplace Blogs & Workplace Privacy*, 66 La. L. Rev. 1079 (2006).

10. Once again, this is not a paper about the extent to which the parties might be allowed to reach agreements to move the point of social protection to the right to provide more privacy protection. See *supra* note 1. The parties can do that and when they do, individuals may well be able to consent to waive those contractual protections, too. Those kinds of agreements and those kinds of waivers may present problems analogous to those discussed in this paper. But they also have distinctive features. I will not discuss the analogies or the distinctions here.

11. Under certain circumstances, society may prohibit even the individual from disclosing information within this space. As I will discuss later, I think this is generally to protect certain social interests that extend beyond the

authority of the individual to determine whether disclosure is permitted:

The root idea of privacy is that of a privileged territory or domain in which an individual person has the exclusive authority of determining whether another may enter, and if so, when and for how long, and under what conditions. Within this area, the individual person is—pick your metaphor—boss, sovereign, owner.¹²

Thus, privacy and consent are intimately connected. Within the domain protected by privacy, the thing that is protected is precisely the individual's authority to consent or to withhold consent. This concept of privacy protects human dignity in either case.¹³ The ability to consent, the necessity of consent, empowers individuals to express and invite intimacy in a way not possible if the information were freely available. Protection when consent is withheld affirms society's respect for an individual's control over central aspects of his own existence.¹⁴ Thus, privacy enhances an individual's ability to express and invite intimacy, while maintaining respect for his authority to maintain secrets. It is consent that regulates these dual functions of privacy and that allocates to the individual authority over the precise function privacy is to play.¹⁵

This connection between privacy and consent has consequences for the language we use. The concept of waiver, for example, seems ill-suited to the task. It would be odd in many circumstances (for example, invitations to intimacy) to think of the situation as one where a privacy violation has occurred, but has been waived. Quite the contrary. When individuals consent in privacy situations, they are not waiving a right, but instead they are *exercising* the central right protected by privacy, the authority to

individual and beyond the core idea of privacy, which is precisely to protect the *individual's* right to control this type of information. See *infra* pp. 998–1001.

12. Joel Feinberg, *Offense to Others* 24 (1985).

13. Stated another way, this conception of privacy is deontological in nature, rather than utilitarian. The claim is not that privacy protection will produce the most utility across society or for individuals. Rather, the claim is that privacy protection is an important part of our society's respect for persons and their right to self-determination. John Kleinig, *The Ethics of Consent*, 8 *Can. J. Phil.* 91, 115–17 (Supp. 1982)

14. Jeffery H. Reiman, *Privacy, Intimacy, and Personhood*, 6 *Phil. & Pub. Aff.* 26, 39 (1976). Reiman argues that this type of control is central to the very concept of personhood. See also Heidi M. Hurd, *The Moral Magic of Consent*, 2 *Legal Theory* 121, 123–24 (1996).

15. Post, *supra* note 9, at 969–74.

decide. Similarly, contract terms such as consideration and modification seem out of place. It would be odd to think of consent as some type of contract modification requiring consideration when there was no contract in the first place, but rather a type of social protection that can be affected by contract but does not depend on contract for its existence or enforcement.¹⁶ Once again, consent is the exercise of an authority protected by tort law, not part of an independent agreement between the parties.¹⁷

Viewed in this way, the issue of consent in employment settings becomes both more salient and more problematic. If our willingness to credit employee consent becomes extremely constrained because of doubts about voluntariness in the employment setting, we are not aiding the cause of employee privacy. Instead, we are stripping privacy of one of its central component parts and infringing on one of its principal values: the ability of individuals to decide these matters for themselves rather than to have them controlled by others. Always refusing to recognize employee consent transfers authority to the courts and buys us little in the name of privacy.¹⁸ At the same time, we infringe on the central value of privacy if we credit employee consent too readily. Recognizing employee consent in situations where they do not have good information or adequate freedom to

16. Cf. Kleinig, *supra* note 13, at 114 (distinguishing between promise and consent); *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280 (7th Cir. 1986) (discussing distinction between contract modification and waiver).

17. Once again, in this article, I am discussing only the area to the left of the point of social protection. See *supra* note 10. If employer and employee enter into a valid contract to move the point of protection to the right, then the space between the *social* point of protection and the new *contractual* point of protection is, of course, the product of an independent agreement between the parties. Talking in contract terms about how to enter into and modify contractual points of protection to the right of the social point would be appropriate.

18. Although the argument in this article is primarily deontological, see *supra* note 13, limiting the authority of employees to consent also has very practical implications. If employees cannot consent to privacy intrusions, employers will be less likely to consult closely with employees in making decisions that might affect their privacy. More crudely, if employees cannot consent as a matter of law, employers will be unwilling to pay anything to obtain that consent. Cf. Christopher T. Wonnell, *The Contractual Disempowerment of Employees*, 46 *Stan. L. Rev.* 87, 145 (1993) (employees would be empowered if they could agree to specific performance as a remedy when they breach employment contracts).

make a meaningful choice also undercuts the principal value of privacy protection.¹⁹

II. THE CURRENT STATUS OF CONSENT AT WORK

A recent draft of the Restatement of Employment Law contains the clearest statement of current law on employee consent in privacy situations.²⁰ In the most recent draft of the privacy section, the Restatement greatly limits the ability of employees to consent to privacy intrusions.²¹ Thus, the Restatement sides with those who worry about the ability of employees to consent effectively. But, of course, this is a trade-off. When the Restatement minimizes the ability of employees to consent, it also limits their autonomy. In this section, I will examine the draft Restatement language closely and apply it to several situations. As with all Restatements, this draft language not only “restates” the law; it attempts to

19. For a more complete discussion of the conditions required for a valid consent, *see infra* pp. 1001–1008.

20. The American Law Institute began a project several years ago to restate the law of the employment relationship. Christine Jolls, a professor and highly-regarded scholar at the Harvard Law School, is the reporter for the privacy section of this effort. The first draft of the Restatement of Employment Law, issued in May, 2002, contained only a short memorandum on privacy issues. Restatement (Third) of Employment Law 1-11 (Prelim. Draft No. 1, 2002) (the numbering system for this draft was not ideal; these pages appear at the very end of Preliminary Draft No. 1). A more substantial consideration of privacy issues was presented in the second preliminary draft issued in 2004. Restatement (Third) of Employment Law §§ 5.01–5.04 (Prelim. Draft No. 2, 2004). A revised and more complete version of the privacy section was included in the third preliminary draft issued in May, 2005. Restatement (Third) of Employment Law §§ 5.01–5.06 (Prelim. Draft No. 3, 2005) (hereinafter “Restatement (Third)”). Later in 2005, a draft of the Employment Law Restatement was prepared for presentation to the Council of the American Law Institute. That draft, however, did not contain a section on privacy issues. Restatement (Third) of Employment Law (Council Draft No. 1, 2005). Similarly, a discussion draft prepared for the 2006 annual meeting did not contain a privacy section. Restatement (Third) of Employment Law (Discussion Draft, 2006). Thus, the Restatement’s latest consideration of privacy issues is contained in Preliminary Draft No. 3. That is the draft this article will consider.

I am a member of the Members Consultative Group for the Restatement of Employment Law and have commented on each of the drafts.

21. This draft of the Restatement of Employment Law is still under consideration by the American Law Institute and, therefore, does not yet represent the position of the Institute. For stylistic reasons, I will refer to the draft Restatement language on privacy in various ways, but every reference should be understood as referring only to a draft that has not yet been adopted or approved. This is true even when I refer simply to the “Restatement” without direct reference to its draft status.

reformulate and improve it. This section will focus on the draft Restatement language, but it is also intended to explore problems with the current state of the law more broadly.

Under the draft Restatement language, a privacy violation occurs if an employer's conduct intrudes upon an employee's privacy interests and is highly offensive to a reasonable person in the employment context.²² On the first prong, the Restatement makes employee consent irrelevant to the most common types of employer conduct that might present a privacy issue. The Restatement specifically lists seven types of questionable employer conduct: examining bodily products, monitoring excretory functions, observing an employee in a state of undress, viewing the contents of a locked receptacle, secretly observing an employee, secretly listening to an employee, and secretly intercepting an employee's telephone conversation.²³ These are the only types of conduct the Restatement currently lists specifically, although others may be added later.²⁴ With respect to all of them, the Restatement says that employee consent is irrelevant.²⁵

22. Restatement (Third), *supra* note 20, § 5.0(1)-(2). The Restatement currently considers only the "intrusion upon seclusion" aspect of privacy. E-mail from Christine Jolls to Steven Willborn (April 21, 2006) (on file with author). Thus, it does not cover the other aspects of Dean Prosser's classic four-part formulation, including especially the disclosure prong. Prosser, *supra* note 9, at 389-407. I learned this late in the process of writing this article and it may affect some of the situations I discuss. The extent of the impact will obviously depend on the approach to consent adopted for the other aspects of privacy. If consent is viewed as skeptically later as it is in the current draft, the effect will be minimal.

23. *Id.* § 5.03(1)-(7). I have shortened the descriptions of the conduct a bit; please refer to the Restatement for a more complete description. In addition, here and elsewhere, I will generally refer only to employees, even though the Restatement is rightfully careful to include applicants within the protected group.

24. The Reporter for this portion of the Restatement has indicated that the list is not yet complete and that, at a minimum, an additional category will be added to cover computer monitoring. E-mail from Christine Jolls to Steven Willborn (April 21, 2006) (on file with author).

25. *Id.* § 5.04(1) ("Notwithstanding an employee's or applicant's express or implied agreement to submit to a particular form of employer conduct, the employer conduct intrudes upon employee privacy interests if it falls within [one of the seven specified categories]"). There are two odd twists to this. First, three of the specified behaviors require the employer to engage in the conduct "secretly." *Id.* § 5.04(5)-(7). The Restatement recognizes that employee consent may indicate that the conduct was not secret. *Id.* § 5.04, comment b. But even there, it nods to employee consent only grudgingly. *Id.* ("in some circumstances employee or applicant agreement will mean that an employer behavior no longer meets the secrecy requirement" (emphasis added)). Presumably, the Reporter is thinking of circumstances in which the employee agreement is too vague or old to obviate the secrecy of the employer's conduct.

In addition to the specified categories of conduct that might intrude upon an employee's privacy interest, the draft Restatement language also has a catch-all: an employer also invades an employee privacy interest if it intrudes upon an employee's reasonable expectation of privacy in some other way.²⁶ With respect to the catch-all, the Restatement says that employee consent is relevant, but limited in value. In these other circumstances, employee consent "does not necessarily negate the employee's . . . reasonable expectation of privacy," but instead is merely evidence that "together with other factors [may] support the conclusion that the employee . . . lacks a reasonable expectation of privacy"²⁷

To be unlawful under the draft Restatement language, an employer's conduct must also be highly offensive to a reasonable person in the employment context.²⁸ The Restatement makes it clear that employee consent is also irrelevant to this prong of a privacy claim.²⁹ This determination is to be made solely by balancing two objective factors: the degree of invasiveness of the employer conduct and the weight of the employer's business reasons for engaging in the conduct.³⁰

Thus, the Restatement's current position is that employee consent plays only a very limited role in privacy cases. In cases where the employer's conduct falls within one of the seven specified areas, employee consent is wholly irrelevant. It is irrelevant to determine whether there has been an intrusion upon a privacy interest precisely because the conduct falls within one of

Second, another of the specified behaviors is viewing the contents of a locked receptacle. The draft Restatement language says that employers may be able to avoid problems with this privacy category simply by keeping a key to the receptacle and so informing the employee or applicant. *Id.* § 5.04, comment c. This is not central to my argument here, but it is interesting. Thinking of this situation as consent at all reflects a fairly narrow view of what might be required to obtain employee consent. All the employer has done, after all, is to keep the key and inform employees. This implies the possibility of consent through mere notice, a position that is advanced elsewhere in the Restatement of Employment Law. Restatement (Third) of Employment Law § 3.05 (Discussion Draft, 2006) (in most circumstances, unilateral commitments of employers can be modified or revoked by notifying employees). As I discuss later, I do not think that is a sufficiently robust view of consent for these purposes. *See infra* pp. 1001–1008.

26. Restatement (Third), *supra* note 20, § 5.03(8).

27. *Id.* § 5.04(2)(a) & (b).

28. *Id.* § 5.02(2).

29. *Id.* § 5.05.

30. *Id.* § 5.02, comment b.

the seven specified areas. It is irrelevant to determine whether the intrusion was highly offensive to a reasonable person because employee consent is always irrelevant on that issue. Employee consent is only relevant under the Restatement's current approach in situations where the employer's conduct might intrude upon an employee's privacy interest because it interferes with a reasonable expectation of privacy. But even there, the role of employee consent is limited. Employee consent is relevant in that circumstance, but the draft Restatement language makes clear that employers can intrude on reasonable expectations of privacy even in the face of employee consent.

Consider how the Restatement's construct would apply to this situation:

Steve Willborn is a performance artist. His art is innovative and highly entertaining,³¹ but it involves his total nudity and that of several other performers whom he employs.³² He notifies his fellow performers of the nature of his art and requires them to sign a document consenting to the required nudity. After some performances, one of the performers sues him for an invasion of privacy. Is Willborn liable?³³

Willborn would be liable under the Restatement's proposal. The employee would have to prove both that the conduct invades a privacy interest and that it is highly offensive to a reasonable employee.³⁴ On the privacy interest prong, the conduct falls within one of the specified types of questionable conduct (observing an employee in a state of undress).³⁵ Thus, the employee's consent is irrelevant.³⁶ Willborn has intruded upon his employee's privacy interest.

On the offensiveness prong, the employee would have to prove that the degree of invasiveness outweighs the employer's business reasons for the behavior.³⁷ I made this a performance artist

31. Just like his lectures.

32. This is in contrast to his lectures, so you did not miss anything if you were not at the symposium itself (or, alternatively, you should not feel such relief at having missed the symposium).

33. Although this hypothetical may seem farfetched at first glance, it is not hard to find similar situations in real life. See *Feminist Women's Health Center v. Superior Court*, 61 Cal. Rptr. 2d 187 (3rd Dist. Ct. App. 1997) (rejecting privacy claim of employee who was required to demonstrate cervical self-examinations in front of other employees as part of her job responsibilities).

34. Restatement (Third), *supra* note 20, § 5.02(1)-(2).

35. *Id.* § 5.03(3).

36. *Id.* § 5.04(1).

37. *Id.* § 5.02, comments b, c, & d.

hypothetical to make it easy to meet this prong. One of the principal objects of my performance art (it is *my* performance art, after all), like much performance art, is precisely to arouse people by being highly offensive. The offensiveness prong is an objective test, so my particular intent does not matter and certainly my business reasons are strong. But the Restatement takes special care to indicate that a high degree of invasiveness (and my art will involve a very high degree) will outweigh even important business reasons.³⁸ Thus, the “highly offensive” prong would also be met.³⁹ The Restatement is clear that the employee’s consent has no role in this part of the analysis either.⁴⁰ Other situations involving employee nudity, such as sumo wrestling and dancers at strip clubs, would be closer calls, but they would also certainly violate the privacy interests of employees and may violate the objective balancing test, without regard to any consent the employees might have given.⁴¹

This example illustrates two types of problems with the Restatement’s proposal. First, the Restatement’s distrust of consent undermines one of the central values of privacy. A principal value of privacy is to allocate to individuals control over central aspects of their lives. The draft Restatement language protects employees from having that control usurped by

38. *Id.* § 5.02, comment d.

39. A common response to this hypothetical is to claim that such performance art could *never* meet the offensiveness prong; the invasiveness of the employee nudity would always be outweighed by the employer’s strong business interest in artistic performance. I think this objection misses the mark for two reasons. First, this framework exposes employers like Willborn in the hypothetical to the *risk* that judges and juries will view the balance differently. The risk itself is a problem and, in this particular case, is likely to impose a burden on free expression. Moreover, the risk will be greater as the artistic expression becomes less socially acceptable, which heightens the burden on free expression. Second, the objection misses the main point of the hypothetical: the problem with severe limits on employee consent. Employees are not permitted to consent to this type of nudity and, thus, employers can take no refuge in consent. If this hypothetical does not seem convincing, then imagine your own in which the conduct is highly offensive, but for whatever reasons the employee really wants to consent to it. This framework does not respect employee autonomy sufficiently to honor the consent and, as a result, it inhibits the ability of employers to engage in the activity.

40. *Id.* § 5.05.

41. It is worth noting that the draft Restatement language does not provide employers in Willborn’s position with any option to ensure that they would not be sued later. Although the Restatement does not speak to the issue directly, it would be quite odd to permit an employee to waive these privacy rights. The same factors that cause the Restatement to take the position that we should ignore employee consent would also apply with the same force to an employee waiver.

overreaching employers. But instead of restoring that authority to employees, the Restatement transfers it to the courts. Even the most competent and knowledgeable employee with the freedom to exercise meaningful choice cannot consent to these types of privacy intrusions. The proposal deprives employees of an important part of the dignity and respect normally conferred by privacy law. Second, the Restatement framework permits privacy law to be used to limit free expression. It may well be that society disapproves of performance art, sumo wrestling, strip clubs, and the like, but if that is the case, then direct regulation would be far preferable to regulation through privacy law. Both direct regulation and privacy law would infringe on the ability of individuals to engage in these activities, but direct regulation would at least avoid the paradox of prohibiting employees from agreeing to engage in these activities within a doctrinal framework intended to protect the ability of individuals to make these choices.⁴²

This hypothetical also raises problems relating to the timing of consent. The draft Restatement language makes no distinction between a waiver signed at the time of hiring and a waiver signed after ten years of employment. Both should be ignored or, alternatively stated, employees are denied autonomy in both situations. A more nuanced view of autonomy is certainly possible. In this circumstance, the demand by Willborn is the same in both cases: take your clothes off.⁴³ The threat, however, is different. In the first situation, the threat is to refuse to hire the employee. In the second situation, the threat is to fire a current employee. Generally speaking, the first threat is not as severe as the second threat. In a world with many entry-level jobs, being excluded from one may not be too high a price to pay to protect employee autonomy. The employee, however, has much more invested in the second situation. Permitting the employer to fire her is a high price, maybe too high a price, to ask the employee to pay for autonomy.⁴⁴ Note the distinction between this position and

42. As I discuss later, my view is that other interests, such as worries about performance art or strip clubs, can override privacy, but that it is paradoxical to claim that privacy interests themselves limit employee consent. Instead, the appropriate way to approach these issues is to recognize that limiting employee consent *is* a limit on privacy, but that under certain conditions privacy interests can be overridden by strong non-privacy interests. See *infra* pp. 998–1001.

43. For a more detailed description of this type of analysis, see discussion *infra* notes pp. 1001–1008.

44. This depends, of course, on a comparison of how long it takes new employees and current employees to find other jobs and the pay and working conditions of those jobs relative to the “first” job. My intuition is that current

the Restatement position. The draft Restatement language does not differentiate at all between different levels of employer pressure and, as a result, does not nod at all to employee autonomy. The position I will suggest below is not the opposite of that: total deference to employee autonomy. Rather, it calls for a more nuanced view of employee choice and autonomy, thereby permitting the possibility of more employee control over these important decisions. The position argues for deference to employee autonomy when the cost of that deference is reasonable (or, alternatively stated, when employees can exercise a meaningful choice), but no deference otherwise.⁴⁵

Consider another situation, this one from real life:

Trevis Smith, a former University of Alabama linebacker, plays for the Saskatchewan Roughriders in the Canadian Football League. With his consent, the team administers an HIV test and discovers that he has the virus. But he does not consent to release of the information. Can the team release the information without his permission or not let him play?⁴⁶

As we did last time, let us begin by considering how this situation would be analyzed under the draft Restatement language. First, how does the Restatement suggest we analyze the initial consent given by Smith to conduct the HIV test? The first issue is whether the test constitutes an invasion of an employee privacy interest. The Restatement is clear that the employer's conduct is an invasion of Smith's privacy interests. The employer conduct falls within one of the specified questionable behaviors: examining an employee's bodily products.⁴⁷ Thus, the employee's consent is irrelevant.⁴⁸ This seems odd: an employer invades an employee's privacy interests when it conducts a blood test *with the employee's*

employees are more disadvantaged in these regards than new employees, but it is an empirical question. See Robert Topel, *Specific Capital, Mobility, and Wages: Wages Rise with Job Seniority*, 99 J. Pol. Econ. 145, 147 (1991) (finding that ten years of experience increases the wages of a male worker by 25 percent). But see Joseph G. Altonji & Nicolas Williams, *Do Wages Rise with Job Seniority? A Reassessment*, Nat'l Bureau of Econ. Research, Working Paper No. 6010, 29-31 (1997), available at <http://papers.nbor.org/papers/w6010> (concluding that returns to seniority are modest).

45. See *infra* 1001-1008.

46. Rick Westhead, *H.I.V. Debate Emerges in Canada*, N.Y. Times, Nov. 15, 2005, at C27. I will not consider any complications arising in this case because Canadian law would apply.

47. Restatement (Third), *supra* note 20, § 5.03(1).

48. *Id.* § 5.04(1).

consent. But it is a direct consequence of the distrust of employee consent in the Restatement and its concomitant limit on employee autonomy.

Be that as it may, Smith's consent is relevant under the draft Restatement language, if at all, only on the issue of whether the test would be highly offensive to a reasonable employee. One would think the consent would be quite relevant to that issue, indeed, virtually dispositive. My own intuition is that most reasonable employees would find it to be highly offensive if an HIV test were done without their consent, but would find it completely inoffensive if the test were done with their consent. But the Restatement comes out quite differently on this. The employee's consent to the test is irrelevant under the Restatement.⁴⁹ The offensiveness of the test depends solely on the balance between the degree of the invasiveness of the test against the employer's business reasons for administering the test.⁵⁰ Again, it seems very odd to think about the degree of invasiveness in this context without thinking about whether the employee consented, but that is what the Restatement asks us to do.⁵¹ Under the Restatement, there *is* a privacy invasion by irrebutable presumption, so the outcome would seem to depend mostly on the employer's interest in administering the test. If that interest is not strong enough or absent, even a fairly modest invasion may be too much. More about this type of issue later.⁵²

But what about the second half of the problem: will the employer violate Smith's privacy if it discloses the results of the HIV test? This is a situation that falls within the Restatement's catch-all category, rather than one of the seven specified behaviors. The employer will infringe on the employer's privacy interest if its actions intrude upon the employee's reasonable expectation of privacy.⁵³ A Restatement comment says that will turn on "background societal norms" which are "familiar from cases arising under the federal Constitution."⁵⁴ Whether that is true or not (and I have serious doubts), our focus here is on the role of employee consent in making that determination. On that, the Restatement says only that the employee's privacy interests may

49. *Id.* § 5.05.

50. *Id.* § 5.02, comment b.

51. I find it hard to believe that employee consent would not be entered into this analysis through the backdoor by saying it is relevant to the degree of invasiveness of the employer's conduct, but what the Restatement tells us explicitly is that it is not going to do that. *Id.* § 5.05.

52. *See infra* pp. 989-91.

53. Restatement (Third), *supra* note 20, § 5.03(8).

54. *Id.* § 5.03, comment i.

be infringed, even if the employee *has* given consent.⁵⁵ In this case, however, the employee has *not* given consent. The Restatement does not address this specifically, but the thrust of the Restatement indicates that the absence of consent would be very important, maybe determinative, in deciding whether the employer violated the employee's reasonable expectation of privacy. Assuming such a violation, has there been an *unlawful* invasion of employee privacy? That depends, once again, on whether the unconsented release is highly offensive to the reasonable employee which, in turn, depends on how the degree of invasiveness compares to the employer's reasons for the invasion.⁵⁶ In this case, the invasiveness is high (unconsented release of medical information),⁵⁷ but the employer's business reasons for release are also high. Football, after all, is a violent sport where exchange of bodily fluids takes place regularly; the employer has an interest in protecting other players, among other things.⁵⁸ A Restatement comment says that a serious intrusion on a privacy interest may trump an important business interest,⁵⁹ but it is impossible to say how that concept would be applied in practice.

Finally, consider a variation. In Smith's case, there were third-party interests at stake that provided justification for the employer's interest in his HIV status.⁶⁰ What if these third-party interests did not exist? Consider this situation:

Eddie Curry was the fourth pick in the 2001 National Basketball Association draft. He did not play in the last thirteen games of the 2004–2005 when he was diagnosed with an irregular heartbeat. After the season was over, his employer, the Chicago Bulls, asked him to take a DNA test to make sure he did not have a related medical problem:

55. *Id.* § 5.04(2) (consent does not “necessarily negate” employee’s reasonable expectation of privacy, but instead is one relevant factor).

56. *Id.* § 5.02, comments b, c, & d.

57. Obviously other law, such as HIPAA, may apply to situations like this. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified as amended in scattered sections of 42 U.S.C. and 29 U.S.C.). Our focus, however, is on the privacy claim. For discussion of how to consider statutes affecting privacy interests, see *infra* pp. 998–1001.

58. Tony Miles, a player who played against Mr. Smith in the Canadian Football League, said that he was “shocked” he was not informed of Mr. Smith’s status: “I don’t want to be the one who goes out and plays a sport that I love and comes home H.I.V. positive. I’m just overwhelmed that he was out there playing while H.I.V. positive” Westhead, *supra* note 46, at C27, col. 4.

59. Restatement (Third), *supra* note 20, § 5.02, comment d.

60. See *supra* note 58.

hypertrophic cardiomyopathy. That condition had caused the sudden deaths of other basketball stars, such as Reggie Lewis and Hank Gathers. Curry refused to take the test. Can the Bulls conduct the test anyway, or fire him?⁶¹

As a preliminary matter, under the proposed Restatement analysis, Curry's privacy will be violated if the test is administered, whether or not he consents. This employer conduct falls within one of the specified behaviors (examining bodily products).⁶² Therefore, it is a privacy intrusion and employee consent is irrelevant.⁶³ But will the employer act unlawfully if it conducts the test even without consent, or fires him? One issue this raises is whether the two options ought to be treated the same. It seems likely the employer would act unlawfully if it conducted the test without Curry's permission. Using the Restatement's balancing test, that would seem to be highly offensive to the reasonable employee; the invasion of Curry's privacy interest would be severe and there is only a limited employer interest. On this last point, note that unlike Smith's case, here the employer's interest is much lower. The danger is only to Curry himself, not to others.⁶⁴ Should, then, the employer also be prohibited from discharging Curry because he refuses to take the test? This raises a question about symmetry between the two situations.⁶⁵

But consider another possibility. What if Curry *consented* to the DNA test and then sued for a privacy violation later? Again, even with consent, the employer has invaded Curry's privacy

61. *Bulls, Curry, Lawyers Tussle Over DNA Testing*, USA Today, Sept. 29, 2005, at 12C. The firing issue is, obviously, complicated. For our purposes, it would help to assume a) that there is no union involved and b) that the individual contract is silent on the issue. Neither of these, of course, was true in the Curry case.

Two other items of interest on the case itself. First, the situation was resolved when the Bulls traded Curry to the New York Knicks who, presumably, did not ask for a DNA test. Second, the Bulls' precise offer to Curry was, shall we say, fairly generous. The precise offer was, please take the test. If you pass it, fine, we will continue to pay you \$5 million per year. If you fail it, we will pay you \$400,000 per year for 50 years. NBA Approves Curry's Trade to Knicks, <http://www.msnbc.com/id/7279844/did/9584562> (Nov. 4, 2005) (last visited March 1, 2006). Query: If Curry had agreed to the DNA test, should this offer cause us to give more or less weight to his consent? See *infra* 1001-1008.

62. Restatement (Third), *supra* note 20, § 5.03(1).

63. *Id.* § 5.04(1).

64. In this respect, the case is like *UAW v. Johnson Controls*, 499 U.S. 187 (1999), in which the Supreme Court said the employer's business concerns did not extend to protection of the fetuses of workers. That issue, the Court said, should be left to the female workers, themselves. If anything, this case is easier: the danger is only to Curry, himself.

65. See *supra* note 111.

interest. The intrusion falls within one of the specified behaviors, so the consent is irrelevant. Would the DNA test be highly offensive to the reasonable employee? Once again, this turns on a balance between the seriousness of the invasion and the weight of the employer's business-related reasons. This raises two sets of issues. First, does Curry's consent lessen the seriousness of the invasion? My intuition is strongly that consent would lessen the seriousness of the invasion, but the Restatement asserts that consent is irrelevant.⁶⁶

Second, does it matter to the privacy claim that the employer's business-related reasons for the intrusion are very minor? Once again, the only danger here is the danger to Curry himself. What should the result be where the privacy invasion is relatively minor (because consent was given, but nevertheless a privacy violation because for that purpose the consent must be ignored), but there is *no* legitimate business-related reason for the invasion? The Restatement says that a serious invasion can override an important business-related reason.⁶⁷ It does not say whether a not-so-serious invasion can result in high offensiveness where there is little or no business justification. Does the balancing test require the intrusion to override the business justification just a little bit, or a lot? Does the extent of the imbalance required vary depending on the severity of the privacy intrusion? These types of questions and this type of indeterminacy, of course, are general problems with balancing tests.

In sum, the most current approach to the issue of employee consent, the draft language of the Restatement of Employment Law, illustrates problems at two levels. First, at a broad level, the approach greatly minimizes employee autonomy and, in so doing, undermines one of the principal functions of privacy protection. Second, at a more fine-tuned level, the approach fails to provide clear and straightforward answers to even relatively simple questions, and certainly not to more difficult ones. There should be a straight, quick, and intuitive answer to the question of whether an employee's privacy has been violated when an employer conducts a medical test *with* the employee's permission. The current approach does not do that, primarily because it doubts too much the ability of employees to consent.

66. Restatement (Third), *supra* note 20, § 5.05.

67. *Id.* § 5.02, comment d.

III. THINKING ABOUT CONSENTING EMPLOYEES

It is much easier to describe problems and criticize the approach of others than it is to suggest solutions. The rest of the paper will suggest solutions, or at least guidelines for thinking about solutions.

In an ideal world, an approach to the issue of employee consent to privacy intrusions would accomplish several goals. First, it would recognize and affirm the role of consent within a privacy regime. It would recognize the value in permitting individuals to choose for themselves the boundaries of their own privacy, which will vary between individuals and across circumstances. Second, where employee consent is to be relied upon, it would ensure that the consent was meaningful. This would mean that the employee was competent, had good information, and adequate freedom to make a meaningful choice.⁶⁸ Third, results would be predictable for both employees and employers. Among other things, this would mean that balancing tests would be minimized.

Of course, we do not live in an ideal world. Trade-offs have to be made when goals conflict. The gritty reality of the workplace will interfere with the ability to have pristine employee consent. The world is complex, so it will be impossible to specify every outcome. Nevertheless, these general goals can help us think better about an acceptable approach to employee consent within a privacy regime.

A. *Privacy is Only One Good Regulated by Consent*

Problems with consent are not unique to privacy. Consent is everywhere in employment law.⁶⁹ Employees consent to receive certain wages, to changes in their health care packages, to their hours and working conditions, to everything.⁷⁰ To be sure, there

68. See *infra* 1001–1008.

69. Even more broadly, of course, problems with consent are present everywhere in the law generally. But I am going to stick here to something about which I know at least a little bit.

70. Obviously, I am mushing together many different types of consent here. Wages probably require an actual agreement, promise or contract; changes to health care plans are often accomplished by consent or endorsement; employees probably assent or merely submit to working conditions; the latest draft of the Restatement claims that employers can change most goods by mere notice to employees. Restatement (Third) of Employment Law § 3.05 (Discussion Draft, 2006). It is certainly true that consent is a rich concept with an extensive “semantic field.” Kleinig, *supra* note 13, at 93 (consent encompasses many terms including agreement, acquiescence, compliance, concurrence, willingness, connivance, condonation, accession, assent, submission, approval, permission,

are concerns in all these areas with the ability of employees to consent effectively, which often leads to regulation of either consent or of the substantive arrangements themselves. Indeed, employment law can be viewed generally as society's reaction when it is dissatisfied with the outcomes produced by consensual arrangements.⁷¹ But this merely re-emphasizes the central role of consent in the employment relationship, with law operating only at the margins when society thinks that consent has failed for one reason or another.⁷²

For our purposes, this means that, once a privacy right is recognized, the focus should be on the validity of employee consent, not on the nature of the particular privacy right at issue. It is certainly possible to parse different types of privacy invasions and then make claims about the role of consent given the particular type of privacy at stake. That is, in fact, what the Restatement does when it says that employee consent has a role for particular types of privacy threats, but not for others. But I have come to believe that is wrong, primarily because of the ubiquity of consent in employment law. If the general approach to consent is going to be to parse each of the particular goods at stake into pieces with consent playing a different role for each piece, then the result will be chaos. There are simply too many goods and too many possible ways to parse.⁷³

Let me be clear, however. This is a fairly limited claim about focus. It is not a claim that important differences in privacy threats should be ignored. First, I am talking here only about situations

promise, authorization, consensus, concord and endorsement). But once again this merely serves to re-emphasize the main point here: consent, broadly construed, is ubiquitous in employment law.

71. Willborn, *supra* note 4, at 3.

72. Professor Selmi makes a closely related point in his contribution to this symposium. His point, reinterpreted, is that privacy is only one good in the workplace and not even close to the most important good. Michael Selmi, *Privacy for the Working Class*, 66 La. L. Rev. 1035, 1045-46 (2006) ("[I]t is not at all clear that privacy is the crucial "dignity" value—if we were concerned about employee dignity, we ought to begin by requiring employers to pay a living wage. Compared to wages and even working conditions, consider the recent mining disasters in West Virginia, privacy is at most a secondary or even a tertiary workplace value.").

73. In the draft of the paper I presented at the conference, I attempted this type of parsing with privacy. I attempted to identify different kinds of privacy that might then require different levels of consent. But I now think that that type of approach places the emphasis on the wrong side of the equation. The emphasis should be on consent, not on the particular good (privacy) being regulated by consent.

where there is social protection for the privacy interest at stake; situations to the left of the point of social protection in Figure 1.⁷⁴ Determining the point of social protection will, of course, require close examination of the precise nature of the privacy interest at stake. Consent is irrelevant to that inquiry because the inquiry's purpose is to decide if consent is necessary.⁷⁵ But once that inquiry has concluded that privacy protection applies, the thing protected is the employee's ability to maintain or waive privacy.⁷⁶ Thus, the focus at that point should be on consent, not on the level of the privacy threat.

Second, to say that the focus should be on consent is not to say that no attention should be paid to the good at stake, in this case privacy. As I will discuss later, the nature of the privacy claim has a role to play in our evaluation of the validity of employee consent. We may well be more skeptical of free consent in situations where the privacy threat is high than we are in situations where the privacy threat is very minor.⁷⁷ But again, the claim here is that the *focus* should be on the consent at that point, not on the level of the threat to privacy. The level of the threat to privacy is relevant, but only because it may tell us something about the validity of consent.

B. Privacy as a Special Good

Although many goods are regulated by consent, privacy is a special good. When privacy protections apply, the thing that is protected is the ability of employees to give or withhold consent.

74. See *supra* p. 978.

75. The distinction here—that consent is relevant only after a determination that social protection applies—cannot be made cleanly. Although the first determination should be made mostly based on other factors, see *supra* pp. 977–78, the culture of the workplace and the social setting will also be relevant. As Justice Scalia put it famously in another context, “A professional football player’s working environment is not . . . abusive . . . if the coach smacks him on the buttocks as he heads onto the football field—even if the same behavior would reasonably be experienced as abusive by the coach’s secretary . . . back at the office.” *Oncala v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81, 118 S. Ct. 998, 1003 (1998). Factors such as culture and social setting can be squeezed into the semantics of consent; people choose to join and participate in creating work cultures. But to the extent possible, I think it would be preferable to view the first step of the analysis as determining whether consent is required and the second step as determining whether consent has been given. But a caveat: This is a paper about the second step of the analysis where I claim strongly that consent is the only issue. I have paid less attention to the proper analysis for determining whether a privacy interest exists which shifts authority to the individual holding the interest.

76. See *supra* 978–80.

77. See *infra* 1002–04.

With other goods, there is a social interest in protecting the ability of employees to choose, but there is always something else that is protected, too. Thus, the focus on consent is all the more crucial when privacy is the good at stake because, in a very direct sense, consent is *the* good, and the only good, being protected.

To illustrate, compare minimum wage regulation and privacy protection. When a state imposes a minimum wage, it is infringing on an employee's ability to consent to lower wages, but it is doing so to protect another employee interest: a fair wage.⁷⁸ One way of thinking about the demise of *Lochner*,⁷⁹ which relied heavily on protecting the ability of employees to choose long hours, is that the courts began to defer much more to the legislature's judgment that this other interest was sufficiently strong to override the interest in protecting employee consent.⁸⁰ When privacy is protected, in contrast, the only good that is being protected is the employee's authority to consent. There is no other accompanying good analogous to the interest in fair wages.⁸¹

This means that the focus on consent is even more crucial in privacy cases than it is in the many other situations where consent is relevant. In every other case, there is another good which can be balanced against the loss of autonomy. With privacy, the good

78. Given the current level of the federal minimum wage, this is an overly generous statement of the employee interest protected. It would be closer to the mark to say that the federal minimum wage protects something like the employee's interest in avoiding unconscionably low wages, or something like that. But a "fair wage" is shorter and, since the precise description is not relevant to my argument here, I will use it for that reason.

79. *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539 (1905).

80. Or, conversely, the courts came to believe that the right to contract (consent) was almost never sufficient to override the legislature's determination that another interest was more important. Cf. David A. Strauss, *Why Was Lochner Wrong*, 70 U. Chi. L. Rev. 373 (2003) (*Lochner* was wrong not because it recognized the important value of freedom of contract, but because it failed to recognize the complexities of balancing that right against other important interests).

81. One of my readers suggested at this point that privacy *does* include non-consent interests analogous to the interest in fair wages. Just as minimum wage laws are intended to protect the interest in fair wages, privacy is intended to protect employee interests in secrecy, anonymity, and solitude. See *supra* note 6 and accompanying text. The difference, I think, is that there is a societal interest in fair wages independent of employee consent, but not in secrecy, anonymity, and solitude. Within the privacy regime, there is no societal interest in any particular level of secrecy, anonymity, or solitude, so long as the employee consents to that level. The point of privacy law is to protect the employee's authority to control these aspects of her life. But there is a societal interest in maintaining fair wages, even if the employee would consent to lower wages. The point of the minimum wage laws is not primarily to protect employee choice, but rather to ensure a particular wage level.

being protected, the only good at stake, *is* autonomy. Limiting the role of consent in privacy cases yields an incoherent result; limiting consent undermines the only interest privacy is intended to protect. As a result, focusing on consent in privacy cases is even more important than it is in the rest of employment law.⁸²

C. *The Role of Courts*

The function of consent in employment law generally, and the special nature of privacy as a good, have direct implications for the role of the courts in privacy cases: once a privacy right has been recognized, a court's role should be to ensure respect for the employee's consent or withholding of consent. Thus, a court might appropriately inquire into whether the employee had sufficient capacity to consent (for example, was of legal age and sound mind) or whether the employee had sufficient freedom to make a meaningful choice. But when a valid consent is present, a court should not as part of the privacy analysis examine the outrageousness of the privacy invasion or inquire into the reasonableness of the consent.⁸³

Moral philosophers would refer to this position as one of weak paternalism. It is appropriate for a court to disregard a person's consent if they are not in a position to give genuine consent and would not consent if they were in a position to give genuine consent. On the other hand, my position rejects strong paternalism. If the person does give genuine consent or would consent if in a position to do so genuinely, courts should respect that outcome without further inquiry.⁸⁴

82. The special role of consent in privacy law is a strong reason for rejecting the draft Restatement's suggested "notice" rule for changing employer obligations which applies to most employment goods. Restatement (Third), of Employment Law § 3.05 (Discussion Draft, 2006). First, as stated in the text, for other goods, there is something other than consent at stake. For privacy, the good at stake *is* consent. Thus, something more than employer notice should be required to evidence consent. Second, the employee's right to exercise consent arises only after a privacy interest has been recognized. Thus, privacy is unique in that this prior step allocates authority to decide away from the employer and to employees. Permitting employers to reclaim that authority by simple notice is inconsistent with the prior finding of a privacy right. *But see* Marigny v. Ellis, 1991 WL 126370 (E.D. La. 1991) (finding employee consented to drug testing when he continued to work for employer after notice of policy).

83. My position is not that these additional inquiries are improper in general. My position is rather that they should not be made as part of the privacy analysis.

84. On weak and strong paternalism generally, see Robert Young, *Autonomy and Paternalism*, 8 Can. J. Phil. 47 (Supp. 1982).

To illustrate, consider a situation where the employer flagrantly invades an important privacy interest of an employee, with little or no business purpose, but for whatever reasons the employee has given valid consent to the invasion. My position, weak paternalism, is clear that in this circumstance, courts should not find a privacy violation. The employee has consented and that ends the inquiry. Courts should not inquire further into how severe the privacy intrusion was or how little justification there was for it.

Note two things about this. First, this differs from the Restatement's approach. For severe privacy intrusions, those that fall into the seven specified categories, the Restatement says that employee consent should be ignored.⁸⁵ Thus, in those areas at least (and maybe more), the courts' focus will be on other factors, such as the seriousness of the intrusion or the employer's business interest, rather than on the employee's consent. As I have said repeatedly, I think this undermines the very interest privacy is intended to uphold—the authority of the individual over these decisions.⁸⁶

Second, in the real world, things are not going to be as clean as in my hypothetical where the employee's consent is handled by assumption. In the real world, the validity of the employee's consent is likely to be at issue and, as I discuss later,⁸⁷ factors such as the degree of the intrusion and the employee's business interest will be relevant to making that determination.⁸⁸ The key, however, is to identify the issue appropriately. The issue is whether the employee *has* consented effectively. If she has, the courts' inquiry

85. Restatement (Third), *supra* note 20, § 5.04(1).

86. Although the argument is not made explicitly, the Restatement could be based on the claim that consent within the employment relationship is so compromised that a prohibition against recognizing such consent is the only administratively feasible way of preventing improper employer pressure. Viewed in this way, disregarding employee consent would be a "second-best device for preventing certain forms of deception and duress that cannot be attacked more directly." Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 Yale L.J. 763, 777–78 (1983) (making, but eventually rejecting, this argument with respect to prohibitions against self-enslavement). *See also* Wonnell, *supra* note 18, at 134–35. I think it would be quite difficult for this argument to be made convincingly, which may be why it is not forwarded in the Restatement. Sustaining the argument would require, first, an explanation of why the threats of employer pressure are so much greater in privacy law than they are everywhere else in employment law where employee consent is examined critically, but accepted, and, second, an explanation of how such a disregard of consent can be aligned with the primary interest privacy law is intended to protect, employee autonomy.

87. *See* discussion *infra* Part III.E.

88. *Id.*

is over. The other information is relevant only insofar as it assists in making the consent determination.

D. *Disregarding Consent*

If this is the courts' role, are there any circumstances in which an employee's consent should be disregarded? That is, *assuming valid consent*,⁸⁹ are there any circumstances where a court should ignore or override that consent?

Within the privacy regime, courts should never ignore or override valid employee consent. To permit courts to "protect" privacy by ignoring employee consent is incoherent within the privacy regime. The function of privacy is to protect employee autonomy: and authority over these important aspects of her life. Thus, at best, it is inconsistent with the goal of privacy protection to permit courts to ignore consent. More precisely, I think, it is incoherent theoretically to ignore employee consent in a regime designed specifically to protect that consent.

Note two important aspects of this claim. First, I am assuming here that there has been a valid consent, that is, a consent by a competent employee, with adequate knowledge, and with adequate freedom to make a decision. This means that courts will continue to play a very important and difficult role in privacy cases. In the next section, I will discuss how they should approach the issue of consent in these cases. But the point here is that evaluating consent is the extent of their appropriate role within the privacy regime. When they determine that a valid consent has been given, they must respect it. If they ignore consent and attempt to "protect" privacy anyway, they infringe rather than advance the core value protected by privacy.

But it is also very important to note the caveat that courts must not ignore consent *within the privacy regime*. I will admit, indeed claim, that circumstances exist where consent should be ignored or overridden. Examples include situations where third parties will be harmed, where there are laws prohibiting the activity, and where there are claims that consent involves selling things which should not be commodified.⁹⁰ My claim is that it may be appropriate to

89. As I discuss later, by valid consent I mean consent by a competent employee, with adequate knowledge of the circumstances, and with adequate freedom to make a choice.

90. See Leo Katz, *Choice, Consent, and Cycling: The Hidden Limitations of Consent*, 104 Mich. L. Rev. 627, 628 (2006). The focus of Professor Katz's article is on another situation in which it may be appropriate to disregard consent—cycling. I have not fully sorted through his argument to examine how it might apply to the claim I make in this section, but my first impression is that

disregard consent in these situations, but only because of considerations that lie *outside* of the privacy regime. Within the privacy regime, the only appropriate outcome, given the autonomy-enhancing purpose of the regime, is to credit consent whenever it is valid. To do otherwise renders the privacy regime incoherent. But there are circumstances where interests outside of the privacy regime come into play and override the autonomy-enhancing privacy interest at stake. If third-party interests are at stake, those third-party interests lie outside the privacy regime which is intended to protect the autonomy interests of the individual holding the privacy right. The third-party interests may be strong enough to override the privacy interest at stake.⁹¹ Make no mistake, when a third-party interest overrides a privacy interest and consent is ignored, there is an infringement on the privacy interest. But it is a justified infringement.⁹²

To illustrate, consider again the Trevis Smith hypothetical discussed earlier.⁹³ Assume that Mr. Smith has a protected privacy interest and that he does not consent to release of the information about his HIV status. Thus, the privacy interest at stake requires respect for his lack of consent. At the same time, however, there are important third-party interests at stake—primarily the health of other players on the field.⁹⁴ My claim is that the appropriate way to analyze this claim is to determine whether the third-party interests are sufficiently important to override the privacy interest at stake. These third-party interests are not the privacy interest or even part of the privacy claim. Quite the contrary, they are inconsistent with the privacy claim. But if they are sufficiently strong, they can override the privacy claim.

cycling is an interesting variation of third-party effects. Cycling only occurs when there are two or more parties consenting. Thus, for my purposes, it would fall within the claims I make for disregarding consent when third-party interests are at stake.

91. In this sense, the claim is analogous to the claim I made about the minimum wage earlier. See *supra* notes 78–81 and accompanying text.

92. I do not mean to imply here that these other concerns must involve third party interests. With respect to anti-commodification, for example, infringement on privacy may be justified by essentially paternalistic concerns relating to the pursuit of human freedom or human flourishing. Margaret Jane Radin, *Market-Inalienability*, 100 Harv. L. Rev. 1849 (1987). My points are simply: a) that these concerns are not appropriate *within* a privacy regime designed to enhance individual autonomy, but b) they can be relied upon to override the privacy interest if considered appropriately as an important interest outside of the privacy regime.

93. See *supra* text accompanying notes 46–59.

94. See *supra* note 58.

Consider another example. In 1988, Congress enacted the Employee Polygraph Protection Act.⁹⁵ One of the Act's goals was to protect the privacy interests of employees, specifically, to protect them from questioning that could be especially intrusive.⁹⁶ The Act also greatly limited the ability of employees to consent to polygraph examinations.⁹⁷ How should courts analyze situations in which employees freely consent to polygraph examinations?⁹⁸ As with the Smith case, if considered solely within the privacy regime, courts should protect autonomy by respecting and enforcing employee consent. But here there are important interests outside of the privacy regime that override this privacy interest. First, Congress also sought to protect interests other than privacy when it enacted the Employee Polygraph Protection Act.⁹⁹ Respect for those interests and Congress's recognition of them overrides the interest in employee privacy. Second, even if Congress thought it was enacting the law solely to protect employee privacy,¹⁰⁰ courts should defer to the choice Congress made. Once again, the appropriate analysis is to determine whether the outside interests are sufficient to override the privacy interest at stake. When positive law limits employee consent,¹⁰¹ the outside interests generally will override the privacy interest at stake in part because of Congress's recognition of those outside interests and in part because of appropriate deference to another branch of government. But this should not be confused with protection of employee privacy. Even when the legislature

95. 29 U.S.C. §§ 2001–2009 (1988).

96. See *Texas State Employees Union v. Texas Dept. of Mental Health & Mental Retardation*, 746 S.W.2d 203, 204 (Tex. 1987) (striking down state agency polygraph policy in part because of intrusive control questions). Cf. *Soroka v. Dayton Hudson Corp.*, 1 Cal. Repr. 2d 77 (1991) (striking down employment test in part because of intrusive questions).

97. 29 U.S.C. §§ 2002, 2006(d). See *Polkey v. Transstecs Corp.*, 404 F.3d 1264 (11th Cir. 2005) (employer violated polygraph act by asking employee to take test, even though she refused).

98. For circumstances in which employees may want to consent to polygraph examinations, see Willborn, *supra* note 4, at 303.

99. See S. Rep. No. 100-284 (1988), reprinted in 1988 U.S.C.C.A.N. 726 (expressing concern over inaccuracy and unfairness of polygraph examinations).

100. Congress would be confused if it attempted to protect employee privacy by prohibiting employees from consenting to privacy invasions, unless it thought effective consent was impossible, see *supra* note 86, but Congressional confusion alone would probably not be a sufficient ground to justify failure of the courts to defer to a coordinate branch of government.

101. Congress could act solely to identify the point of social protection, rather than both to identify that point and to limit employee consent. If Congress acts only to identify the point of social protection, but then permits employees to consent within the identified domain, Congress' action would not conflict with the privacy regime and no balancing would be required.

requires it, ignoring employee consent is inconsistent with appropriate notions of privacy. But generally it is a justifiable inconsistency.

The advantage of distinguishing between interests within and outside the privacy regime is that it leads to conceptual clarity. The privacy interest is recognized in law to protect the autonomy of individuals. To claim that consent can be disregarded within the privacy regime is inconsistent. On the other hand, to say that the autonomy interest can be overridden by other factors, such as third-party interests or positive law, is perfectly appropriate. This is an infringement on privacy, to be sure, but in appropriate circumstances, it is a justified infringement. This conceptual structure ensures that the privacy interest is recognized, evaluated, and credited appropriately, even though it may be overridden at times by outside interests.

E. Judging Consent

Given this approach to privacy, the precise framework for assessing employee consent is crucial. Employee autonomy is the central interest being protected by a privacy regime and, consequently, consent is the primary issue in privacy cases after a privacy interest has been identified. But, of course, determining whether an employee has given valid consent is extremely difficult. As I said at the beginning, everyone agrees that consent is a difficult and compromised concept in employment law.¹⁰²

Recognizing this difficulty, courts should weigh three factors in evaluating the validity of consent from employees:¹⁰³ a) the

102. See *supra* notes 3–5 and accompanying text. In a beautiful article, Robert Gordon argues that employee consent simply cannot be evaluated by examining the level of coercion, as I suggest here. Instead, employee consent is respected, or not, for “moral, economic and political reasons independent of the degree of coercion.” Robert W. Gordon, *Using History in Teaching Contracts: The Case of Britton v. Turner*, 26 U. Haw. L. Rev. 423, 433 (2004). I have my doubts about the analysis here, too. Again, this is a difficult problem. But the value of this analysis is that it attempts to protect and enhance autonomy and dignity by respecting the ability of employees to regulate their own level of privacy.

103. I discuss here only one of the three elements required for a valid consent: ability to make a meaningful choice. Westen, *supra* note 2, at 177–245. I will not discuss the other two elements required for valid consent. First, only competent employees can give a valid consent. Thus, issues may arise with respect to who can give consent with respect to minors or people who are incompetent because of limited emotional or cognitive capacity. For good discussions in other contexts, see Alan Wertheimer, *Consent to Sexual Relations* 215–57 (2003); Joel Feinberg, *supra* note 12, at 316–43. Second, valid consent can be given only with appropriate knowledge. For example, consent may not

invasiveness of the privacy demand made by the employer, b) the level of the employer's threat in making the demand, and c) the employer's business interest in making the demand.¹⁰⁴

In evaluating employee consent, the level of the privacy intrusion is one relevant factor. Obviously, not all privacy intrusions are created equal. Consider the following possibilities:

1. A sexual relationship.
2. Requiring a drug test with direct observation of urination.
3. Requiring a blood test to check for HIV.
4. Hidden cameras in the lobby area.
5. An inappropriate hug by a supervisor.

be valid if an employer affirmatively misleads an employee about the consequences of consenting. Westen, *supra* note 2, at 187–89. See Norman-Bloodsaw v. Lawrence Berkeley Laboratory, 135 F.3d 1260 (9th Cir. 1998) (general consent to medical examination may not cover examination covering highly private and sensitive medical and genetic information).

It is worth noting that, although these elements overlap significantly with elements required to enter into a contract, they are not the same. See Restatement (Second) of Contracts §§ 9–16 (capacity), 159–73 (misrepresentation), 174–77 (duress and undue influence). For example, some concepts central to contract, such as consideration, do not play a role at all here. In addition, in contrast to contract law which begins with presumptive neutrality, consent in privacy law arises only after a privacy interest has been identified which allocates authority in a certain direction. For a discussion of similarities and differences between consent and promises (contract), see Feinberg, *supra* note 12, at 178.

Finally, I consider here only consent by individual employees. Consent through unions or other agents is also an important issue but, once again, I do not address it here. For interesting discussions, see Pauline T. Kim, *Collective and Individual Approaches to Protecting Employee Privacy: The Experience with Workplace Drug Testing*, 66 La. Law Rev. 1009 (2006); Stewart Schwab, *The Unions as Broker of Employment Rights* (March 20, 2003) (unpublished manuscript, on file with the Louisiana Law Review). See also *Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683 (9th Cir. 2001), *cert. denied*, 534 U.S. 1078, 122 S. Ct. 806 (2002) (privacy action is not preempted by federal labor law because collective bargaining contract cannot be interpreted to provide consent); *McCoy v. Kretschmar*, No. 88-4222, 1989 WL 145391 (9th Cir. 1989) (unpublished opinion noted in table at 890 F.2d 420) (privacy claim fails because consent to release information was provided through collective bargaining agreement).

104. I am indebted to Joel Feinberg for thinking about employee consent in this way, although I am talking about a different context than he was and I make many changes because of the context. Feinberg, *supra* note 12, at 199–228.

Because I am focusing on consent, I assume here that all of these privacy invasions are sufficient to create a privacy interest: to shift to the employee the right to consent or not to consent to the invasion. I also assume (and claim)¹⁰⁵ that, if the employee has validly consented, the consent would mean that there is no privacy violation. But there are obvious differences in the degree of the privacy invasion in these examples. An unconsented hug from a supervisor is quite different than an unconsented sexual relationship (which is generally referred to as a rape). Roughly speaking, the items decrease in seriousness as you go down the list.

The claim here is that this factor is relevant to consent, but it is relevant in a complicated way. On the one hand, because we should expect consent to be granted more readily at the bottom of the list, we should also be willing to credit vague consent there more readily. I might consent to a hug without much thought or much explicit consent; much more is required before I might consent to a sexual relationship. Thus, for this reason, a court should be much more willing to find consent at the bottom of the list than the top, given exactly the same expression of consent. On the other hand, assuming the same level of threat to induce consent, the impact on the consent evaluation would cut in the opposite direction. For example, assume that the threat is to refuse your request for three days of vacation over Thanksgiving, unless you consent to the privacy intrusion. This is a type of pressure to be sure. But it is more likely to be undue pressure sufficient to undermine consent at the bottom of the list than at the top. I am quite unlikely to agree to an unwanted sexual relationship in return for three days of vacation; I may well consent unwillingly to a hug for that payment. On this, then, the implications cut the other way. Any given level of threat is more likely to be coercive at the bottom of the list than at the top.¹⁰⁶

These two uses of the level of the privacy violation in evaluating employee consent are not inconsistent. They are simply different uses. The points here are a) that evaluating the level of the privacy intrusion is an important part of evaluating whether the

105. With direct observation of urination, one might assert that that should be a problem even if the employee consents. See *Kelley v. Schlumberger*, 849 F.2d 41 (1st Cir. 1988) (applying Louisiana law) (violation of right to privacy and negligent infliction of emotional distress to observe urination directly). My claim is that if the employee consents, there should not be a privacy claim absent some consideration outside of the privacy regime which would override that consent. See *supra* 998–1001.

106. Joel Feinberg deals with this general concept in interesting and clever ways. Feinberg, *supra* note 12, at 199–210.

consent is valid and b) this factor must be considered in a sophisticated fashion as it can cut in either direction.

A second factor to consider in evaluating employee consent is the level of the employee's threat in making the demand. Consider the following possibilities where the employer says consent or I will take the following action:

1. Fire you from your long-time job.
2. Not hire you for an entry-level job.
3. Reduce your annual bonus by \$5,000
4. Refuse your request for three days of vacation over Thanksgiving.
5. Not greet you when you come to work in the morning.

This factor is also relevant to whether the employee had sufficient freedom to exercise meaningful choice. Consent that is the product of undue pressure is not valid consent because it does not satisfy the interest in employee autonomy protected by privacy law. But as with the level of the privacy intrusion, this is a complicated factor that must be considered subtly. On the one hand, as indicated above, some threats are so minor that they would rarely compromise consent, especially as the level of the privacy intrusion increases.¹⁰⁷ At the same time, even very serious threats do not necessarily mean that voluntary consent has not occurred. It is certainly possible that I would have had a sexual relationship with you even if you had not threatened to fire me. The threat to fire makes it less likely that my consent is voluntary, but it certainly does not make it impossible.

Another complicating factor here is the possibility of coercive offers. My list consists entirely of coercive threats, that is, unless you do what I want I will make your life worse off beginning from some baseline. Coercive offers are also possible, that is, if you consent, I will do something to make your life better beginning from that same baseline. All of the coercive threats listed above can be converted with relative ease to coercive offers. For example, if you consent, I will greet you with great enthusiasm when you arrive for work every morning or I will agree to retain you in your long-time job for the next fifteen years. And, of course, there is no rule that says the situation cannot become even more complicated by including both a coercive threat and a coercive offer: if you consent, I will agree to retain you in your long-time job for the next fifteen years, but if you refuse I will fire you immediately. Intuitively, coercive offers seem to be less

107. See *supra* p. 1003.

problematic than coercive threats. But I see no good reason for that. In either case, consent may be compromised.¹⁰⁸ In either case, a court's difficult job is to evaluate whether the consent is sufficiently voluntary, even in the face of the positive or negative coercion.

The third factor courts should consider in evaluating employee consent is the employer's business interest in making the privacy demand. On this factor, consider two possibilities:

1. An employer seeks drug tests for customs agents involved in drug interdiction.¹⁰⁹
2. An employer places cameras in restrooms purely to satisfy his prurient interests.

All other things being equal, the courts should be more willing to find valid consent in the first situation than in the second. Employees are more likely to consent when they can see an important business interest than when that interest is absent. If employees consent in both of these situations, courts should be more willing to credit the consent in the first than in the second. But again, I am only talking about consent here and, thus, the employer's business interest is relevant only to that issue. If a court finds that employees truly consent in the second situation, protecting privacy requires that courts respect that consent, regardless of how distasteful or irrational the practice may seem to the court.¹¹⁰

The more difficult question here is whether it is really possible to permit only such a limited role for the employer business interest. Assume, for example, that an employee does not consent in the first situation above, so the employer does not hire him. This privacy demand was at a fairly high level (take a drug test)

108. There is considerable disagreement on this point, which I do not have room to recount here. *Compare, e.g.,* Hurd, *supra* note 14, at 144–45 (offers are not coercive because they expand the set of choices available, even if all of them are unattractive) *with* Joel Feinberg, *supra* note 12, at 229–68 (offers can be coercive if offerer creates unattractive conditions). The principal point here is that offers can be coercive under proper circumstances and, as with every other factor, they must be evaluated carefully.

109. See *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S. Ct. 1384 (1989).

110. It is conceivable, for example, that employees might consent to videotaping in a restroom if necessary to apprehend the wrongdoer. *Cf. Liberty v. Walt Disney World Co.*, 912 F. Supp. 1494 (M.D. Fla. 1995) (denying summary judgment for employer who allowed restroom videotapes to continue in an attempt to apprehend the wrongdoer, but without notifying or obtaining consent from those observed).

and the threat in making the demand was high (denial of an entry level job). But the employer's business interest is also high. Does the employer really infringe on an employee's privacy by refusing to hire in this situation? Considering only the consent stage of the analysis (the only stage I focus on in this article), the answer must be that, yes, there is a privacy violation.¹¹¹ This is an infringement of the employee's autonomy, which is precisely what privacy is intended to protect. But there are at least two other steps in the analysis. The consent issue only arises if the employee has a privacy right that deserves protection. Although not the focus of this article, it is possible that the employer's business interest may play a more robust role at that earlier stage. It may be that when

111. This raises a symmetry question which I do not discuss fully here, and that is not discussed in the privacy sections of the Restatement. Should there be a difference between a situation where the employee suffers a privacy invasion and then later sues and a situation such as the one in the text where the employee refuses to consent and is then penalized? Some courts would say the employee has a potential privacy claim in the first situation because a privacy violation has actually occurred, but does not have a claim in the situation in the text because there simply has not been any privacy invasion. See *Everett v. Napper*, 632 F. Supp. 1481 (N.D. Ga. 1986) (no search under Fourth Amendment when discharged employee refused to submit to drug test); *Jennings v. Minco Technology Labs*, 765 S.W.2d 497 (Tex. Ct. App. 1989) (no privacy invasion for employee who refused to submit to drug test). But see *Luck v. Southern Pac. Transp. Co.*, 267 Cal. Rptr. 618 (Cal. Ct. App.), *cert. denied*, 498 U.S. 939, 111 S. Ct. 344 (1990) (refusal to submit to drug test is a privacy right protected by state constitution); *Borse v. Piece Goods Shop, Inc.* 963 F.2d 611 (3rd Cir. 1992) (discharge for refusal to submit to urinalysis screening and personal property searches at workplace may state claim for wrongful discharge in violation of public policy). Although I have not thought through this issue fully, my intuition is that the distinction is untenable and that the two situations should be treated the same.

This intuition for symmetry is supported by thinking about the two situations through the prism of employee autonomy. Protection is necessary to safeguard employee autonomy in situations where an employee refuses to consent and the employer penalizes her, just as it is in situations where the employer improperly invades the employee's privacy without proper consent. Both are threats to employee autonomy. Thinking of situations like those in the text as a variety of constructive discharge may be a useful starting point for analysis. See Martha Chamallas, *Title VII's Midlife Crisis: The Case of Constructive Discharge*, 77 S. Cal. L. Rev. 307 (2004).

Elsewhere, the Restatement seems to be heading in this same general direction. Section 4.02(c) would view a discharge for refusing to submit to a privacy invasion as illegal retaliation in violation of public policy. Restatement (Third) of Employment Law § 4.02(c) & comment e (Discussion Draft, 2006). For reasons that are outside the scope of this paper, I would prefer a constructive discharge approach, but the general intuition seems the same.

employees encounter employers with such a strong business interest, they fall on the wrong side of the line in Figure 1: the employees may not have a privacy interest at all.¹¹² Similarly, there is a stage of analysis after the consent stage. It may be that the employer's business interest is sufficiently powerful that it overrides the employee's privacy interest. As discussed above, this result conflicts with the interest in employee autonomy that privacy is intended to protect. But it does so because, in this case, another important interest overrides it—the employer's powerful business interest.¹¹³

This framework for evaluating employee consent is, of course, a balancing test, so it has the problems of all balancing tests, such as inconsistent application and lack of predictability. These problems will be somewhat ameliorated in this context to the extent that courts keep firmly in mind their role and, hence, their purpose in evaluating these factors. Courts should consider these factors only to determine whether an employee has given a valid consent. If a court concludes that a party has given or withheld valid consent, it does not matter how severe the privacy invasion or how weak the employer's business interest. The court should enforce the employee's decision. Even though courts will be considering the level of invasion and the employer's business interest, if they keep their role and this purpose firmly in mind, the likelihood that privacy law will be used improperly to judge an employer's business practices or to override an employee's own choices about her privacy will be reduced.

112. Although not entirely clear, the best reading of the result in the *Von Raab* case itself, 489 U.S. 656, 109 S. Ct. 1384, is probably that, for employees directly involved with the interdiction of illegal drugs, the employer's strong business interest means that they do not have a privacy interest at all. See also *Sheppard v. Beerman*, 18 F.3d 147 (2d Cir.), cert. denied, 513 U.S. 816, 115 S. Ct. 73 (1994) (law clerk has no privacy interest in materials within judge's chambers, including materials in the clerk's own desk and file cabinets). Interesting issues arise out of the interplay between these two stages of the analysis. For example, in the situation in the text, the court could determine that there is no privacy interest in the first place (which would make the consent issue moot), or it could determine that there is a privacy interest, but because of the circumstances employees gave constructive consent. See *Westen, supra* note 2, at 7–8 (discussing decision in Canada to treat assaults in hockey as assaults with constructive consent, rather than as non-assaults). The issues of how to determine the precise point of social protection of privacy and the interplay between that determination and consent are not, however, the subject of this article, so I will not discuss them further. The point here is that the consent issue becomes salient only if a prior determination has been made that there is a privacy interest in the first place.

113. See *supra* pp. 998–1001.

Even with a clear sense of role and purpose, I know this is not an overly satisfying approach to employee consent. Because there are three factors that may cut in different directions and because they are difficult and complicated to apply, this approach may not always (or maybe even usually) yield clear answers. But I see no good alternative. Again, employee consent in employment settings is difficult and compromised. I think this proposal makes some progress by parsing carefully the role of consent in privacy cases and the relevant factors to consider in evaluating employee consent. But at the end of the day, it is still a difficult task.

IV. CONCLUSION

Heidi Hurd has said that consent has moral magic, and indeed it does. The magic occurs because consent produces very important legal transformations. As Hurd so elegantly puts it, "consent turns a trespass into a dinner party, a battery into a handshake, a theft into a gift, [and] an invasion of privacy into an intimate moment."¹¹⁴ But with privacy, consent produces even more magic: it empowers people to take control over important aspects of their lives and, hence, in a very real sense, it creates human dignity. Dignity is especially important in the workplace, and doubly so in the non-unionized workplace, where threats to dignity are omnipresent and powerful. The central point of this article is that great care must be taken to ensure that consent can continue to perform its moral magic in employment law.

114. Hurd, *supra* note 14, at 123.