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American Workers Increase Efforts to Establish a Legal Right to Privacy as Civility Declines in U.S. Society: Some Observations on the Effort and Its Social Context

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American Workers Increase Efforts to Establish a Legal Right to Privacy as Civility Declines in U.S. Society: Some Observations on the Effort and Its Social Context

TABLE OF CONTENTS

I. Introduction	607
II. A Summary Argument for the Decline of Civil Society in the United States	611

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- III. Business Ethics and Attitudes Toward Work Support
Workers' Rights to Limited Privacy in the
Workplace 618
- IV. History of Legal Efforts Leading to Workplace
Privacy 623
- V. Comparison to Other Western Nation States and the
European Community 625
- VI. Discussion of Workplace Privacy 629
 - A. Essential Elements of Privacy 629
 - B. Reduced Expectations of Privacy in the
Workplace 630
 - C. Problem Areas for Workplace Privacy Concepts 631
 - 1. Drug Testing 632
 - 2. Searching Employee Work Areas 634
 - 3. Surveillance of Employees 636
 - a. Capturing Conversations 636
 - b. Monitoring Telephone Calls 637
 - c. E-mail and Computer Monitoring 638
 - d. Regulating Personal Associations 638
- VII. Conclusion 639
 - A. Prudence of Using Law to Guarantee Privacy 639
 - B. Problems of Social & Human Costs Left Out of
Business Equations 639
 - C. Decline of Civility & Increased Claims of Workplace
Privacy: Correlation, Cause or Coincidence? 640
 - D. Root Cause in At-will Rule & Need for Workers' Bill
of Rights? 640
 - E. Circularity of Civility & Privacy: No Shelter
Here 641

I. INTRODUCTION

"Without work all life goes rotten. But when work is soulless life stifles and dies."

Albert Camus (1913-1960)¹

"The study upon which we have been engaged [the history of the common law] is necessary both for the knowledge and for the revision of the law."

O. W. Holmes, Jr. (1841-1935)²

1. GEORGES FRIEDMANN, *THE ANATOMY OF WORK: LABOR, LEISURE AND THE IMPLICATIONS OF AUTOMATION* viii (Wyatt Rawson trans. 1961) (citing Camus in Foreword).
 2. O.W. HOLMES, JR., *THE COMMON LAW* 36 (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881). Holmes believed that "[t]he life of the law has not been logic: it has been experience." *Id.* at 1. Judicially, he later made the same point in more memorable terms: "Upon this point a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

"The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy."

William O. Douglas (1898-1980)³

A nation of approximately 260 million Americans manifests a rich diversity of values and attitudes toward work. Some observers have suggested that attitudes toward work can be accurately classified along class lines or by the color of the worker's collar.⁴ Many people in the United States view work as an important activity; and, unlike the Biblical⁵ or predominant Greek view, work is not merely tolerated as a curse. If anything, the lack of work or unemployment is the modern curse.⁶

The work ethic and secular Calvinism are still endorsed by most people in the United States, but it is probably accurate to say that the Reagan-Bush years witnessed a small boom in the once discredited notion that a person's worth may be measured by his or her wealth. Ostentatious displays of wealth are once again fashionable in certain Washington, DC circles.⁷ A discouraging increase in the negative but related sentiment that poor people are lazy or otherwise undeserving of wealth often accompanies such a fashion swing.⁸ A better reasoned position might be to praise wealth so long as it is the product of honest labor and also recognize the importance of compassion.

Americans often see their identity and self concepts intertwined in their work.⁹ Many, if not most, want their work to be interesting,

3. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (citation omitted).

4. See, e.g., HANNAH ARENDT, *THE HUMAN CONDITION* 77-88 (1958); SEBASTIAN DE GRAZIA, *OF TIME, WORK, AND LEISURE* 40 (1962).

5. *Genesis* 3:17-19.

6. See, e.g., WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* (1996); see also JEREMY RIFKIN, *THE END OF WORK: THE DECLINE OF THE GLOBAL LABOR FORCE AND THE DAWN OF THE POST-MARKET ERA* (1995).

7. See, e.g., WILLIAM H. SHAW, *BUSINESS ETHICS* 83 (3d ed. 1999) (detailing President Reagan's "tax breaks for the rich").

8. Adam Smith said it best:

This disposition to admire, and almost to worship, the rich and the powerful, and to despise, or, at least to neglect persons of poor and mean condition, though necessary both to establish and to maintain the distinction of ranks and the order of society, is, at the same time, the great and most universal cause of the corruption of our moral sentiments. That wealth and greatness are often regarded with the respect and admiration which are due only to wisdom and virtue; and that the contempt, of which vice and folly are the only proper objects, is often most unjustly bestowed upon poverty and weakness, has been the complaint of moralists in all ages.

ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* § III, Chapter 3 (1759).

9. A 1% rise in unemployment in the United States is associated with an increase in suicides of over 4% and an increase in homicides of over 5%. *THE IDAHO STATESMAN*, Dec. 23, 1998, at 3E; see also Angelo Kinicki et al., *Socially Responsible*

challenging, and satisfying.¹⁰ This aspect of the American character provides and will continue to provide serious challenges for managers. Similarly, many workers in the United States—because they see their self-worth tied up in their calling, to use the Calvinist term—are sensitive to wage issues and other conditions of employment. Employment is the central economic relation for every worker. Consequently, much weight attaches to it.

Employment is as central now to an individual's status and ability to survive as the rights to land were 600 years ago in England and Western Europe. In that agrarian society, land was central; all else could be reproduced if one had the right to a sufficient quantity of real estate. The result was that the kings, parliaments, and courts erected an elaborate social and legal system to protect and delineate rights in land. In a famous dictum, Sir Henry Maine argued that the progress of societies has been the movement from status to contract.¹¹ He probably meant that law had moved from the feudal notion of rights inhering in status to notions of contract and property. One major shift in Anglo-American law came when the emphasis on property and contract was displaced by a new concern for human rights.¹²

In this paper, we focus on privacy in employment, an emerging but disputed claim made on behalf of workers who resent being monitored, photographed,¹³ and searched in their places of employment and, usually, as a condition of employment. However, our underlying belief is that the fundamental changes in society away from agrarian to a post-industrial society demand a fundamental shift in laws, ethics, morals, and customs to protect and delineate the rights of workers in their

Plant Closings, PERSONNEL ADMIN., June 1987, at 116 (citing BARRY BLUESTONE & BENNETT HARRISON, *THE DEINDUSTRIALIZATION OF AMERICA* (1982)).

10. See, e.g., HAROLD L. SHEPPARD & NEIL Q. HERRICK, *WHERE HAVE ALL THE ROBOTS GONE? WORKER DISSATISFACTION IN THE '70s* 10-11 (1972) (citing a University of Michigan study). The Michigan study asked workers to rank the importance of 25 aspects of work. The top seven in order of importance were: interesting work; enough help and equipment to get the job done; enough information to get the job done; enough authority to do the job; good pay; opportunity to develop special abilities; and job security.
11. SIR HENRY MAINE, *ANCIENT LAW* 168-70 (1901), quoted in HAROLD J. BERMAN & WILLIAM R. GRIENER, *THE NATURE AND FUNCTIONS OF LAW* 752 (4th ed. 1980).
12. Certainly, this is not to imply that there have not been other major shifts in Anglo-American jurisprudence over the centuries.
13. For examples of abusive uses of miniature surveillance cameras, see Eric Fidler, *Smile You're On . . . Tiny Cameras Can Invade Your Life and Put It On Public Display*, THE SPOKESMAN-REVIEW, Aug. 30, 1999, at A9. Fidler discusses some of the more outrageous uses of the new low-cost snooping devices. In one situation, 28 plaintiffs filed suit in Cook County Circuit Court in July 1999 against the makers and distributors of videotapes that were made surreptitiously in locker rooms at Northwestern University, Eastern Illinois, Illinois State and University of Pennsylvania. The tapes were advertised on an Internet site as tapes of "hot young dudes."

employment relations. Perhaps, the time has come to dispense with the discredited notion of employment at will¹⁴ and to replace it with a new approach to employment in which workers' human dignity, job security, and health are paramount.¹⁵

This paper will address the hypothesis that a breakdown in civil society has created a void that the emerging law of workplace privacy is attempting to fill. Establishing an increase in incivility in United States society since 1945 cannot be done with scientific accuracy.¹⁶ We will argue for the increase of incivility using anecdotal evidence, opinions of social observers, and data from selected proxies for incivility such as divorce, crime rates, and arrests.

A former frontrunner for the GOP Presidential nomination, Elizabeth Dole, listed as one of her top priorities the elimination of incivility in public life and in the United States Congress.¹⁷ Even traditional patterns of etiquette are in decline. Under older formal notions and standards of civility, a "gentleman would avert his eyes" if a lady accidentally displayed more ankle than was deemed seemly. Many of us were taught not to "eavesdrop" on the conversations of others either over a party telephone line or in an adjoining room of the home. These traditional notions of civility, respect and decency were carried into the American workplace. Now, we seem to have, as a majority, moved toward a much looser, informal standard of civility, one that in the Western states allows cowboy hats and blue jeans at the Philharmonic as well as at the Governor's Inaugural Ball. As Boy Scouts, we were schooled to be friendly, courteous, and kind.¹⁸ We

14. Deborah A. Ballam, *The Traditional View of the Origins of The Employment-At-Will Doctrine: Myth or Reality?*, 33 AM. BUS. L.J. 1, 48-49 (1995).

15. See, e.g., Norm Bowie, *Challenging the Egoistic Paradigm*, 1 BUS. ETHICS Q. 1, 19 (1992). Professor Bowie argues that the underlying reason for corporations is, contrary to Nobel Laureate Milton Friedman's stance of profit maximization, to provide meaningful employment to its workers. This philosophy might well underpin a federal workers' bill of rights some day.

16. See MARK CALDWELL, *A SHORT HISTORY OF RUDENESS: MANNERS, MORALS, AND MISBEHAVIOR IN MODERN AMERICA* (1999) for an excellent book-length treatise on the causes of the decline of civility in the United States. Caldwell presents a history of the decline of manners. He argues that we have become obsessed with the perceived decline of civility in recent years, but that the actual history of the erosion of etiquette can be traced back several centuries to the blurring of class distinctions and the rise of a new middle class.

17. William Saletan, *A Tale of Two Liddys*, MOTHER JONES, May-June 1999, at 29. Saletan writes "[Elizabeth Dole's] ingenious solution is to make congressional incivility in both parties a moral issue. America faces a plague of 'crime, violence, drugs, illegitimacy, and incivility,' she declares. 'If public life is lacking in civility, then it is our common task to help civilize it.'"

18. While growing up in Milwaukee, I (Wines writes) was a Boy Scout from 1956-1958. I went back to my old HANDBOOK FOR BOYS (B.S.A., 5th ed. 1951) to check out the Scout Law that lists 12 virtues for boys. A Boy Scout is trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty, brave, clean, and reverent. See *id.* at 26-27.

were taught to hold doors open for women, to walk on the curbside when escorting a female companion, to hold chairs for ladies to be seated, and to remove caps and hats when indoors. Alas, chivalry died. Older, more formal standards of civility have retreated in the face of charges of sexism and elitism. In some instances, good manners have been annihilated by social turmoil. In part, this is one of the social legacies of the 1960s.

Although some critics argue it might take "700 pages" to make such an argument,¹⁹ the next section will attempt to summarize arguments both anecdotal and statistical for the decline in civility in United States society since the Second World War.

II. A SUMMARY ARGUMENT FOR THE DECLINE OF CIVIL SOCIETY IN THE UNITED STATES

The traditional role of "good manners" in a society is to ease potential friction between members of the society by providing norms of respect and deference that ease social interactions. As indicated in the introduction, the decline of civility norms²⁰ has left a vacuum in areas

Thinking that it might be informative to see what the new Boy Scout Handbook looked like, I ordered one. THE BOY SCOUT HANDBOOK (B.S.A. 11th ed. 1998), opens with a 21 page treatise on child abuse entitled, *How To Protect Your Children From Child Abuse: A Parent's Guide*. *Id.* at 1-21. For contrast, the old HANDBOOK opens with a title and copyright page, a short history of the HANDBOOK, a Table of Contents, an essay entitled *Fun and Adventure in Scouting* illustrated with outdoor sketches, and Part I on *How to Become a Scout*. HANDBOOK FOR BOYS, *supra*, at 1-97.

The contrast between these editions of handbooks speaks volumes about the changing nature of American society. The rise of genuine criminal incivility that necessitated the changes is chilling.

19. Comments by Tom Dunfee, Kolodny Professor of Social Responsibility, Department of Legal Studies, The Wharton School, University of Pennsylvania, made on February 20, 1999 at the presentation of an earlier version of this paper by Professor Wines.

20. When I was a boy (Wines writes), my father cautioned me frequently "to be a good sport," not to object to referee's decisions that were adverse to my team, to respect my opponent, and to be humble in victory and gracious in defeat. Many Americans now are not only bad losers but also bad winners.

An example of bad-winners can be seen in NFL Football. Denver Bronco fans had various confrontations and assaulted Oakland Raider football players after a Bronco overtime victory. See *Mile High Madness: Snowball Fight Pits Raiders Against Bronco Fans*, THE SPOKESMAN-REVIEW, Nov. 24, 1999, at C2. Some Raider players were targets of snowballs that had batteries embedded in them. See *id.* One Raider was charged with battery, and another was not charged when he hit a fan in self-defense. See *id.*

Even the sport of golf, usually noted for decorum and a high level of etiquette, has been hit by declining levels of civility. See Kevin Paul DuPont (Boston Globe), *Antics Shock Euros: Taunts toward Montgomerie, Green Display Leave Bad Taste*, THE SPOKESMAN-REVIEW, Sept. 27, 1999, at C7; Jack Saylor, *Fate Fuels Great U.S. Comeback, Yanks Reclaim Ryder Cup After Rallying Just in Time*, THE SPOKESMAN-REVIEW, Sept. 27, 1999, at C1. These articles are about

previously covered by etiquette.²¹ I do not wish to argue the merits of this social change but merely to argue that it has occurred almost entirely since the end of the Second World War (1945) and principally since 1960.²² Some social changes involved elimination of the double standard (and the pedestal) for women. Some of the etiquette was outdated and in some places it was silent. For instance, there was very little in social norms dealing with men and women working together on the same job as equals; neither was there much to be said about e-mail and drug testing. However, social upheaval also eliminated some courtesies²³ that would have eased some of the current problems the law is attempting to confront as it moves into the privacy arena.

One social commentator has declared that "[i]n some ways, we have become a numb society. Today almost anything seems endurable, inevitable, or unscotchable Nothing seems offensive any longer in a constitutional sense."²⁴ Even the perennially upbeat Ann Landers wrote in her Christmas column, "I am firmly against censorship, but where is the moral outrage against all the filth? It's almost

the story of the American Ryder Cup Team making the greatest comeback in the history of the series and ending six years of European domination. Thirty-thousand American fans "sounded more like a college football crowd as the usually sedate [Brookline] Country Club erupted with every European ebb and American flow." Saylor, *supra*, at C7. "The U.S. team, said [Spain's Jose Maria] Olazabal should have been more mindful of golf etiquette and some fans should be ashamed of the words that came out of their mouths. 'Cheer for your team all you want,' said Olazabal, . . . 'just show respect for your opponent.'" DuPont, *supra*, at C7.

21. See, e.g., Christina Duff, *It's My Party, I'll Cry If I Want to, Cry if I Want to, Cry if I . . .*, WALL ST. J., June 18, 1998, at A1. Duff writes that the use of R.S.V.P. [repondez, s'il vous plait] arose about 25 years ago when people stopped automatically writing notes to acknowledge invitations. Now, there is an epidemic of party goers not even responding to the R.S.V.P. Miss Manners, the nom de plume of etiquette umpire Judith Martin, says "[p]arty givers should wake up and realize that there is 'simply no recognition any more of hospitality as a social contract between guests and hosts.'" *Id.* Etiquette, morals, and ethics can and usually are distinguished. When we talk about the decline of civil society, in a general sense we are talking about the decline of civility which encompasses all three.
22. See, e.g., H. RAP BROWN, *DIE NIGGER DIE* (1969); TOM HAYDEN, *TRIAL* (1970); ABIE HOFFMAN, *STEAL THIS BOOK* (1971); WILLIAM M. KUNSTLER, *MY LIFE AS A RADICAL LAWYER* (1994); JERRY RUBIN, *DO IT* (1970).
23. See *THE CHRON. OF HIGHER EDUC.* (visited Oct. 20, 1998) <<http://daily@chronicle.com>>, which published the following item: "MORE EVIDENCE of rising incivility for professors: Last week a faculty member at the University of Maryland at College Park reported being threatened with a gun by a student who wanted an A in one of the professor's mathematics classes." *Id.* Note assault with a deadly weapon is now being lumped with "incivility." As a nation, we have become very insensitive to violence.
24. LEONARD W. LEVY, *BLASPHEMY: VERBAL OFFENSE AGAINST THE SACRED, FROM MOSES TO SALMAN RUSHDIE* 569 (1993).

impossible to find a family movie these days. What has happened to plain, everyday decency?"²⁵

Crime statistics are up²⁶ while trust levels have dropped in the United States since 1968, a watershed year in American social history.²⁷ In 1968, polls showed a dramatic decline in American confidence in virtually all of our social institutions.²⁸ Although there was a small increase in trust/confidence during the Reagan administration, the levels of trust have not since risen anywhere near the high pre-1968 levels.

In 1990 in the United States, the divorce rate hit 50%.²⁹ Other studies indicate that one-third of all marriages now breakup in less than four years, and a child in the 1990s has a one-in-five chance of experiencing two parental divorces before reaching the age of 18 years. Crime statistics seems to parallel divorce in some areas. For instance, children under ten years were 3 to 40 times more likely to suffer parental abuse if living with a step parent and a biological parent than with two biological parents.³⁰ In urban Canada in the 1980s, a child under two years was 70 times as likely to be killed by a parent if living with a step parent and a biological parent than if living with two natural parents.³¹ Some social commentators argue that childhood itself, a product of the Enlightenment, has virtually disappeared.³² The divorce rates per 1000 women have more than doubled between 1951 and 1993.³³ The results are a bit less dramatic if we use 1945 and 1998 for two reasons. First, 1945 appears to be an anomaly because of the backlog of divorces that was cleaned up when the troops returned home at the end of the Second World War. Second, there is a slight decline in divorce rates since 1991 which may be caused in part by Americans waiting longer to marry and by the increased number of

25. Ann Landers, *Peace on Earth, Good Will Still Remain Elusive*, IDAHO STATESMAN, Dec. 25, 1998, at 2E.

26. See, e.g., THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION (Steven R. Donziger ed., 1996).

27. See, e.g., FREDERICK D. STURDIVANT, BUSINESS AND SOCIETY: A MANAGERIAL APPROACH 32-36 (rev. ed. 1981).

28. See, e.g., Lance Morrow, 1968: *Like a Knife Blade, the Year Severed Past from Future*, TIME, Jan. 11, 1988, at 16.

What died with Martin Luther King Jr. and later, in great finality, with Robert Kennedy, was a moral trajectory, a style of aspiration. King embodied a nobility and hope that all but vanished. With King and Kennedy, a species of idealism died the idealism that hoped to put America back together again, to reconcile it to itself.

Id. at 23-24.

29. Robert Wright, *Our Cheating Hearts*, TIME, Aug. 15, 1994, at 44, 51.

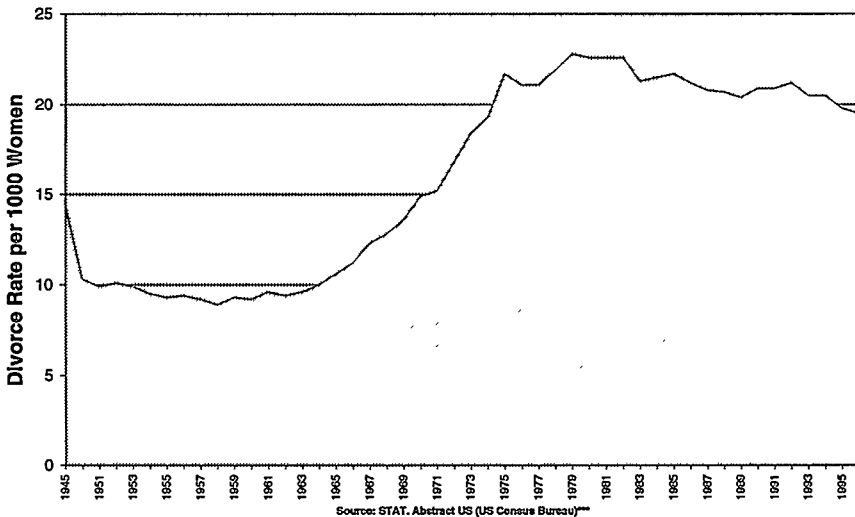
30. See *id.* at 51.

31. See *id.*

32. See, e.g., NEIL POSTMAN, THE DISAPPEARANCE OF CHILDHOOD (Vintage Books 1994) (1982).

33. See STATISTICAL ABSTRACT OF THE UNITED STATES (U.S. Census Bureau, 1998).

UNITED STATES DIVORCE RATE



couples living together without benefit of marriage. Anyway, the doubling of divorce, while it has multiple and complex causes, may be seen as a proxy for a general decline in civility because it manifests an individual's disregard for ritual commitments.

Political discourse seems to have hit an all-time low for America with the Starr Report³⁴ and with President Clinton's impeachment.³⁵ One contrast is the so-called gentleman's agreement under which the press never showed President Franklin D. Roosevelt in his wheelchair or using crutches.³⁶ Also worthy of note for contrast was the silence in the press during the 1960s about President Kennedy's notorious wom-anizing³⁷ a subject then not thought appropriate for reporting.³⁸ To quote one scholar, "the event that did the most to redefine the rela-

34. THE STARR REPORT: THE FINDINGS OF INDEPENDENT COUNSEL KENNETH W. STARR ON PRESIDENT CLINTON AND THE LEWINSKY AFFAIR (released by Congress on Sept. 11, 1998).

35. See, e.g., David Rogers & Jeffrey Taylor, *A President Impeached and a Congress Torn The Show Must Go On*, WALL ST. J., Dec. 21, 1998, at A1.

36. DAVID HALBERSTRAM, *THE POWERS THAT BE* 10 (1979).

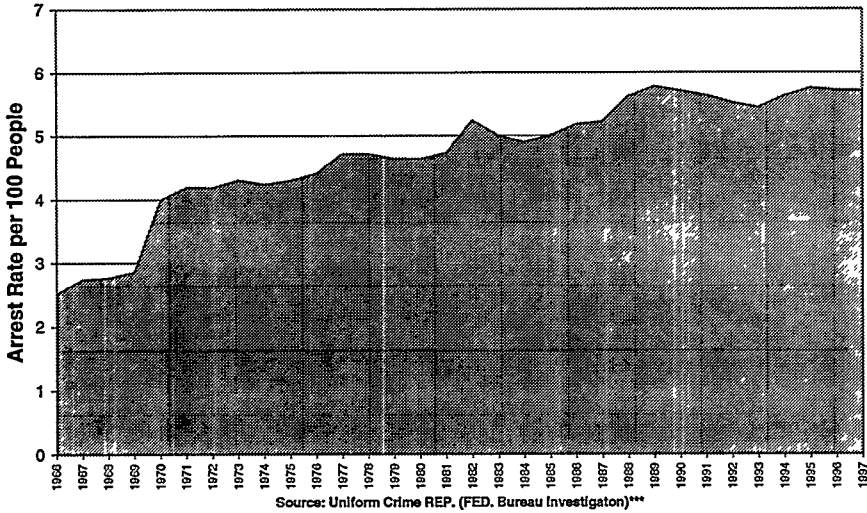
37. WESLEY O. HAGOOD, *PRESIDENTIAL SEX: FROM THE FOUNDING FATHERS TO BILL CLINTON* 135-80 (1995).

38. *Id.*

The media knew about Kennedy's philandering but looked the other way. One former Associated Press reporter said, "There used to be a gentlemen's agreement about reporting such things." The same sentiment was echoed by another observer, who said, "There was a sort of gentlemen's agreement in Washington that you don't talk about my private life and I don't talk about yours . . ."

Id. at 138-39.

ARREST RATE FOR U.S. POPULATION



tionship not only between the news media and the President, but also between the media and all major institutions, was Watergate.”³⁹

In 1940, the U.S. unemployment rate was 14.6 %; and 47.5 million Americans were working.⁴⁰ Virtually all of the workers were male. In 1995, 124.9 million Americans were working; and the unemployment rate was officially 5.6%.⁴¹ Of the 103 million women 16 years or older in this country, 61 million were labor-force participants, that means working or looking for work, in 1995.⁴² Women represented 46% of the civilian labor force in 1995, and women accounted for 59% of the labor-force growth between 1985 and 1995.⁴³

The average American worker earned \$25,852 in 1994.⁴⁴ However, the economist’s assumption of *ceteris paribus* did not apply at the pay window: male workers earned \$32,087 compared to the female average of \$18,684; and white workers took home \$26,696 in contrast to black’s average of \$19,772 and Hispanics average earnings of only \$18,568.⁴⁵ In addition to being a focal point for discrimination and gender-stereotyping, the American workplace is not terribly safe. As-

39. FREDERICK D. STURDIVANT, *BUSINESS AND SOCIETY: A MANAGERIAL APPROACH* 32-76 (rev. ed. 1981); see also BOB WOODWARD & CARL BERNSTEIN, *ALL THE PRESIDENT’S MEN* (1974).

40. *THE WORLD ALMANAC AND BOOK OF FACTS [FOR] 1997*, at 165 (1996).

41. See *id.*

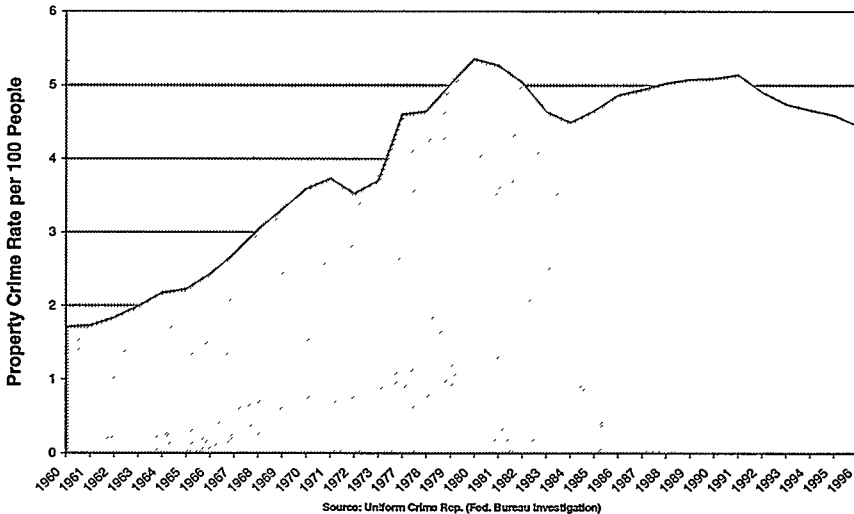
42. See *id.* at 172.

43. See *id.*

44. See *id.* at 167.

45. See *id.*

PROPERTY CRIME RATE FOR U.S. POPULATION



saults and violent acts accounted for 20% of the workplace deaths in 1995, a figure second only to the category of transportation incidents that collectively accounted for 41% of workplace deaths.⁴⁶ These statistics do not reflect a Norman Rockwell America at work. The arrest rate for the general U.S. population has more than doubled between 1966 and 1997.⁴⁷ Certainly arrest does not indicate guilt, but it is fair to say that the vast majority of people who get arrested have been severely uncivil to at least one other person.

Respect for property seems to be in decline, even anecdotally, if one considers the increase in graffiti, littering, and trespassing. Bumper stickers⁴⁸ proclaim "Keep honking, I'm reloading" and "Horn broken, watch driver's finger." Road rage is a new phenomenon on the American scene.⁴⁹ Some may argue against a decline in civility, but they do

46. See *id.* at 168 (citing U.S. Department of Labor sources).

47. See U.S. DEPT. OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES (1998).

48. An example of rudeness attempting to pass for humor: Bumper Sticker from Bad Boy Club, Inc., Bad Boy (Calvin look-a-like) urinating on "YOU". First seen by the author on a late model Oldsmobile Sedan, at Intersection of Hamilton St. and Mission Ave, Spokane, WA, 8:50 A.M., Oct. 21, 1999.

49. See *KXLY 5 P.M. News: 600 Road Worker Deaths in 1996* (ABC affiliate broadcast, Oct. 4, 1999). Many believe that 600 deaths of highway workers are related to "road rage." Some Spokane road workers described angry verbal exchanges with drivers. Workers held a national conference in Seattle to discuss this situation.

not even offer anecdotal evidence to bolster the argument.⁵⁰ Property crime rates in the U.S., however, have more than doubled between 1960 and 1996.⁵¹

As women increasingly entered the workplace, a male-dominated arena, sexual harassment increased. On July 2, 1965, Title VII of the U.S. Civil Rights Act of 1964⁵² took effect and outlawed employment discrimination based upon race, color, religion, national origin or sex (meaning gender). Yet, twenty years after the effective date of this law, the battle about justice on the job for women and Americans of color raged across the second Reagan administration and its judicial appointments.⁵³ The defeat of President Reagan's nomination of Robert Bork to the United States Supreme Court on October 23, 1987 could be understood as a plebiscite on what Americans wanted from their Supreme Court.⁵⁴ In this light, the American people, on the bicentennial of the Constitution, determined by a vast majority that it approved of the directions that the court had taken especially in the areas of equality, privacy, and free speech.⁵⁵ The passage of the Civil Rights Act of 1991 during the Bush Administration further strengthens this argument since its principal effect was to reverse some of the more extreme employment discrimination decisions of the Rehnquist Court and re-instate the earlier court positions.⁵⁶

The awareness of the impending arrival of global capitalism coupled with the discovery by investment bankers that they could make a fortune or two using junk bonds for leveraged takeovers fueled a merger binge in the 1980s. The result was some serious "collateral damage," i.e., a large number of middle managers and other workers were laid off and experienced for the first time "downward mobility."⁵⁷

50. Tom Dunfee, Kolodny Professor at Wharton School of Business, University of Pennsylvania, and Director of the Ethics Center, made this argument at the Huber Hurst Seminar on February 20, 1999 at the University of Florida. He offered no support for it, however.

51. See U.S. DEPT. OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES (1998).

52. Civil Rights Act of 1964, 42 U.S.C. § 2000e-15 (1976).

53. "To claim that there is strict color and gender-blindness in a society that is not color and gender-blind only perpetuates discrimination and circumvents the law," asserted Congressman Don Edwards of California. *Quotes*, A.B.A. J., Aug. 1985, at 35, quoted in William A. Wines, *Title VII Interpretation and Enforcement in the Reagan Years (1980-1989): The Winding Road to the Civil Rights Act of 1991*, 77 MARQ. L. REV. 645, 653 (1994).

54. See Wines, *supra* note 53, at 657.

55. See *id.* at 657.

56. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. For a discussion of the impact of the Act, see Wines, *supra*, note 53 at 710-12.

57. For instance, the \$19.8 billion takeover of CoreStates Financial Corporation by First Union Corporation of North Carolina will result in 7000 of the bank's 19,200 employees losing their jobs. See Rick Brooks, *Those Were the Days Before We Had to Lay You Off*, WALL ST. J., May 5, 1998, at A1.

Principally, it was the down-sizing⁵⁸ and threat of job loss that caused the average American worker to increase his/her work year by 163 hours in the years between 1969 and 1987.⁵⁹ By the end of the 1990s, even the custom of waiting until after the holidays to announce layoffs so as not to spoil workers' Christmases has fallen into the garbage can of history.⁶⁰

III. BUSINESS ETHICS AND ATTITUDES TOWARD WORK SUPPORT WORKERS' RIGHTS TO LIMITED PRIVACY IN THE WORKPLACE

To see life steadily and see it whole⁶¹ is a challenge for each of us; it is the perspective that Aristotle argued was essential to the moral position. Aristotle argued that avoiding extremes and hewing to a "golden mean" was the path of virtue.⁶² Other commentators phrased it this way:

Ethics is, first of all, the quest for, and the understanding of, the good life, living well, a life worth living. It is largely a matter of *perspective*: putting every activity and goal in its place, knowing what is worth doing and what is not worth doing, knowing what is worth wanting and having and knowing what is not worth wanting and having. It is keeping in mind the place of a business career in our life as a whole, not allowing limited business successes

58. On average, 12,831 Americans get sacked every day. "Downsized, rightsized, out-placed, decruited – our language has become rich with euphemisms for getting the pink slip." Susan English, *Companies Won't Return the Feelings*, THE SPOKESMAN-REVIEW, Aug. 29, 1999, at A9.

59. See JULIET B. SCHOR, *THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE* 28-32 (1991).

60. Kristine Henry, *Holiday Pink Slips No Longer Are Taboo*, IDAHO STATESMAN, Dec. 20, 1998, at 1D. Henry states:

There is no wonderful time for a company to declare that it is cutting jobs, but December announcements may be the worst. There's nothing like a pink slip to ruin someone's holiday festivities, and there's nothing like being compared to the Grinch who stole Christmas to make a company look bad This year, U.S. companies have cut nearly 575,000 jobs the highest number since 1993 and many came in the month that traditionally is reserved for parties, bonuses and good cheer.

Id.

61. See Matthew Arnold, *To A Friend*, quoted in KENNETH E. GOODPASTER, *PERSPECTIVES ON MORALITY: ESSAYS OF WILLIAM K. FRANKENA* 106, 227 n.18 (1976).

62. See ARISTOTLE, *THE ETHICS OF ARISTOTLE: THE NICHOMACHEAN ETHICS* 101-07 (Hugh Tredennick ed. & J.A.K. Thomson trans., Penguin Books rev ed. 1976) (1953). Aristotle declares that:

It [virtue] is a mean between two kinds of vice, one of excess and the other of deficiency; . . . , virtue discovers the mean and chooses it. Thus from the point of view of its essence and the definition of its real nature, virtue is a mean; but in respect of what is right and best, it is an extreme.

Id. at 102.

or even business success in general to eclipse our awareness of the rest of life.⁶³

This is no small task and a goal not easily reached. We can see from the above discussion that maintaining a balanced perspective on the topic of one's work has historically defied Western Civilization. Overwork has been a chronic problem for many in the West, and now research suggests it may be epidemic.⁶⁴

An uplifting view of work is available from an English economist who worked in India. E.F. Schumacher argues in his chapter on Buddhist Economics that the function of work is "at least threefold: to give a man a chance to utilize and develop his faculties; to enable him to overcome his ego-centeredness by joining with other people in a common task; and to bring forth the goods and services needed for a becoming existence."⁶⁵ Buddhist economics is very different from modern materialism because "the Buddhist sees the essence of civilization not in a multiplication of wants but in the purification of human character."⁶⁶ Character is formed primarily by work and "work, properly conducted in conditions of human dignity and freedom, blesses those who do it and equally their products."⁶⁷

Moral philosophy recognizes three major approaches to ethical problems: (a) consequential ethics;⁶⁸ (b) ethics of duty;⁶⁹ and (c) the ethics of virtue.⁷⁰ All three have distinct theoretical approaches to the question of how can we know whether an act is good or bad. The consequential position is that an act is good if it produces good results—frequently measured by utility. Duty-based ethics measures the quality of the act by moral yardsticks that are constructed upon rules of moral duties. If an act fulfills the actor's duty, it is moral. Thirdly, the ethics of virtue concentrates on the character of the actor grounded on the premise that we tend to become what we do. Hence, we are always in the process of defining ourselves. Our objective should always be to become a good person, "especially the kind of person who performs right actions by habit and by desire."⁷¹ A good act,

63. ROBERT C. SOLOMON & KRISTINE R. HANSON, ABOVE THE BOTTOM LINE: AN INTRODUCTION TO BUSINESS ETHICS 9 (1983) (emphasis in original).

64. See JULIET SCHOR, THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE (1991).

65. E.F. SCHUMACHER, SMALL IS BEAUTIFUL: ECONOMICS AS IF PEOPLE MATTERED 51-55 (1973).

66. *Id.* at 52.

67. *Id.*

68. See, e.g., JAMES RACHELS, THE ELEMENTS OF MORAL PHILOSOPHY 90-116 (2d ed. 1993) (discussing JOHN STUART MILL, ON UTILITARIANISM (1861)).

69. See, e.g., IMMANUEL KANT, THE FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF MORALS (Thomas K. Abbott trans. & Bobbs-Merrill co-ed., 1949) (1785).

70. See, e.g., ARISTOTLE *supra* note 62.

71. LISA H. NEWTON, DOING GOOD AND AVOIDING EVIL: PRINCIPLES AND REASONING OF APPLIED ETHICS 39 (1992).

then, would be one that complies with the rules, promotes good ends, and—most importantly—moves us in the direction of becoming a good person.⁷²

One synthesis of these different ethical schools is that all tend to promote human dignity. Utilitarianism strives to produce the greatest good for the greatest number of those affected by the act.⁷³ Immanuel Kant (1724-1804) asserts that we must always treat humanity whether in ourselves or in others as an end and never merely as a mean.⁷⁴ Aristotle argues that we should seek to define ourselves as one who habitually and by desire performs right actions right actions being those that make us better human beings.⁷⁵ Consequently, any work that degrades human personality, work that causes pain or work that prevents someone from reaching her potential violates basic ethical precepts. But aside from that exclusion, what types of attitudes toward work should an employer seek to foster in its employees?

Motivation theory states that the factors affecting job performance fall into two categories: (a) hygiene factors; and (b) motivation factors.⁷⁶ Absence of hygiene factors leads to dissatisfaction and unhappiness; but presence of hygiene factors does not motivate.⁷⁷ Absence of hygiene factors can prevent motivation; but—according to the theory—only motivational factors can motivate.⁷⁸ Motivation factors included achievement, recognition, responsibility, advancement, and the characteristics of the job. These factors tended to be associated with esteem or ego needs and with self-actualization.⁷⁹ The findings of a Michigan study⁸⁰ seem to be consistent with this theory.

What attitudes then would a socially responsible employer foster among its workers?⁸¹ Five standards that we believe a socially re-

72. *See id.*

73. *See* RICHARD T. DE GEORGE, *BUSINESS ETHICS* 61 (5th ed. 1999).

74. *See* WILLIAM H. SHAW, *BUSINESS ETHICS* 61 (2d ed. 1996).

75. *See* MANUEL G. VELASQUEZ, *BUSINESS ETHICS: CONCEPTS AND CASES* 133-38 (4th ed. 1998).

76. *See* FREDERICK HERZBERG, *THE MANAGERIAL CHOICE: TO BE EFFICIENT AND TO BE HUMAN* 53-60 (rev. 2d ed. 1982).

77. *See* LESLIE W. RUE & LLOYD L. BYARS, *MANAGEMENT THEORY AND APPLICATION* 361-62 (4th ed. 1986).

78. *See id.* at 361.

79. *See id.* at 362-63.

80. *See* SHEPPARD & HERRICK, *supra* note 10.

81. *See generally* Norman Bowie, *A Kantian Theory of Meaningful Work*, *J. BUS. ETHICS* 1083, July 1, 1998, at 1083. Bowie states that:

a Kantian would endorse the following six characteristics as characteristics of meaningful work:

1. Meaningful work is work that is freely entered into.
2. Meaningful work allows the worker to exercise her autonomy and independence.
3. Meaningful work enable the worker to develop her rational capacities.

sponsible employer would want to provide its workers and endorse in its culture are:

- (1) moderation in the expected amount of work;
- (2) pride in the work product and in the employer;
- (3) voice in the management and direction of the work;
- (4) some freedom in the performance of the work; and
- (5) conditions of human dignity in both performance of the work and in the organizational climate.

But how does one define or even describe the concept of human dignity?

A starting point for the question of human dignity, of course, might be a dictionary. Dignity means "the quality or state of being worthy, honored or esteemed."⁸² In turn, "worthy" is defined as "having worth or value."⁸³ Synonyms are given as "esteemable, honorable, or meritorious."⁸⁴ The opposite of worthy is worthless. Worthless denotes "lacking worth: *syn.* valueless, useless; low: *syn.* despicable."⁸⁵ Direct substitution leads to the statement that human dignity means "having the value of a human being."

What then is the value or worth of a human being? The term "value" comes from the Latin word "*valere*" meaning to be worth, to be strong.⁸⁶ Following various definitions and usages of "value" involving exchange [such as to "give value"] and relative worth, the seventh definition of "value" is "something intrinsically valuable or desirable."⁸⁷ Thus, by substitution, human dignity would mean having the intrinsic value of a human being. Social psychology would support this direction because, at a minimum, there is substantial evidence for a taboo against "intra-species killing."⁸⁸ From a Jungian perspective, a strong ancestral memory declares it is wrong to kill one of our own kind.

Moral philosophy supports this approach. A minimalist approach to duties to third parties (i.e., strangers) requires that one refrain from injuring a stranger, that one tell the truth to strangers, and that

4. Meaningful work provides a wage sufficient for physical welfare.

5. Meaningful work supports the moral development of employees.

6. Meaningful work is not paternalistic in the sense of interfering with the worker's conception of how she wishes to obtain happiness.

Id. at 1083.

82. WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 233 (1963).

83. *Id.* at 1031.

84. *Id.*

85. *Id.*

86. *Id.* at 980.

87. *Id.*

88. See DAVE GROSSMAN, ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY (1996).

one treat strangers fairly.⁸⁹ Fairness can be equated with justice, e.g., giving a person his or her due.⁹⁰ What is due? The essentials are not injuring anyone. From a law perspective, it would require no offensive touching and also not putting one in fear of an offensive touching. This can be understood as respecting the stranger's person and personal space. Using simple tort concepts, we have derived an elemental notion of right to privacy as part of human dignity.

Suppose we reason backwards in an elementary binary manner from a negative stance, the stance of worthlessness. Human dignity would require that we *not* treat a human being as low or despicable. Slavery and involuntary servitude would not be compatible with human dignity, neither would racism or sexism or other forms of categorizing human beings as inferior or possessed of inferior qualities based upon group membership.⁹¹ Neo-classical economics, strictly construed, would violate the concept of human dignity since it treats human labor and thus human lives as interchangeable at the margins with machinery and capital.⁹² The folk story of John Henry's competition with the steam engine illustrates a devaluing of human dignity. Some religious faiths have a theology that decrees "There is that of God in every human being."⁹³ For believers then, to hold human labor exchangeable or fungible with equipment and capital is to demean the sacred or to engage in idolatry.⁹⁴

89. WILLIAM H. SHAW & VINCENT BARRY, *MORAL ISSUES IN BUSINESS* 358-59 (7th ed. 1998).

90. See SHAW, *supra* note 74, at 88.

91. See, e.g., *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 244 (1957) (holding that the First Amendment precluded New Mexico from barring an applicant from the practice of law because he had once been a member of the Communist Party).

92. See, e.g., LARUE TONE HOSMER, *THE ETHICS OF MANAGEMENT* 32-50 (3d ed. 1996); R. Larry Reynolds & William A. Wines, *The Ethical Implications of Various Schools of Economic Thought* (Aug. 7, 1992) (unpublished paper, presented at Society for Business Ethics annual meeting, Las Vegas, Nevada) (on file with author).

93. See, e.g., NORTH PACIFIC YEARLY MEETING OF THE RELIGIOUS SOCIETY OF FRIENDS (QUAKERS), *FAITH AND PRACTICE* (1991).

94. The next question of whether modern employment under capitalism is compatible with a healthy notion of human dignity will not be pursued. That inquiry, while intriguing, is clearly beyond the scope of this paper. The old form of denoting an employment relationship was to talk about "master and servant." Looking at the root for servant, we find that it is the Latin participle *servir*, coming from the Latin word *servire*, meaning to be a slave or a member of a menial class. WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 793 (1963). The synonym is subservient. Hence, when the I.W.W. ("Wobblies") talked about "wage slaves" it was quite literally accurate. A position of servitude would clearly violate conditions of human dignity, at least under our working definition. For an excellent history of the International Workers of the World, see MELVYN DUBOFSKY, *WE SHALL BE ALL: A HISTORY OF THE INDUSTRIAL WORKERS OF THE WORLD* (2d ed. 1988).

Law, philosophy, theology, and social psychology provide arguments for an expanded notion of human dignity. Buddhist economics contributes the concept of a "becoming existence."⁹⁵ We can say that "human dignity" (for our purpose) means "being accorded the respect and status appropriate to a human being, being treated in a way that allows or enables one to live a becoming existence, i.e., a life that 'looks good' on a human being."

IV. HISTORY OF LEGAL EFFORTS LEADING TO WORKPLACE PRIVACY

One of the central tenets of human dignity is a right to privacy, not an absolute right but a substantial right that yields only upon a showing of a greater good. When the founders drafted the Bill of Rights, the right to privacy, that is the right to be left alone in your person, papers, dwelling, and effects, motivated the first, third, fourth, and fifth amendments. In 1890, Samuel D. Warren and Louis D. Brandeis wrote a ground-breaking article for the *Harvard Law Review* in which they advocated a right to privacy as being required by the evolution of technology.⁹⁶ This academic suggestion did not find any constitutional traction⁹⁷ in the courts until seventy-five years later when Mr. Justice Douglas used it in deciding *Griswold v. Connecticut*.⁹⁸

In his *Griswold* decision, Justice William O. Douglas wrote: "We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system."⁹⁹ In a concurring opinion, Chief Justice Earl Warren, Mr. Justice Arthur Goldberg, and Mr. Justice William Brennan argued that the Ninth Amendment, which reserves rights not specifically delegated or enumerated to the People, had been made applicable to the states through the Fourteenth Amendment.¹⁰⁰

Justices Hugo Black and Potter Stewart filed strong dissenting opinions.¹⁰¹ Black indicated that he agreed with all of the criticism

95. See *supra* text accompanying note 65.

96. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). The advances in technology that they had in mind were newspapers and photography.

97. The common law tort of invasion of privacy was well established as early as 1905, according to some authorities. See generally Pauline T. Kim, *Privacy Rights, Public Policy, and the Employment Relationship*, 57 OHIO ST. L.J. 671, 683 n.53 (1996) (stating "the common law right of privacy was decisively recognized in 1905 by the Georgia Supreme Court in *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905).").

98. 381 U.S. 479 (1965).

99. *Id.* at 486.

100. *Id.* at 490-93 (Goldberg, J., concurring).

101. *Id.* at 507 (Black, J., dissenting); *id.* at 527 (Stewart, J., dissenting). Each also joined in the other's dissenting opinion.

aimed at the Connecticut statute by the majority "except their conclusion that the evil qualities they see in the law make it unconstitutional."¹⁰² Furthermore, Mr. Justice Black argued "[t]he Court talks about a constitutional "right of privacy" as though there is some constitutional provision But there is not."¹⁰³ Taking aim at the "so-called right of privacy," Justice Black opined:

'Privacy' is a broad, abstract and ambiguous concept that can easily be shrunken in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things other than searches and seizures For these reasons I get nowhere in this case by talk about a constitutional 'right of privacy' as an emanation from one or more constitutional provisions. I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision.¹⁰⁴

Warren, Goldberg and Brennan's position did not gain any further advocates and so remains a concurring theory to reach the same result that Douglas reached without recourse to the obscure Ninth Amendment. Mr. Justice White filed an opinion concurring in the result but not the majority's reasoning.¹⁰⁵ Mr. Justice Harlan also filed an opinion concurring in the judgment.¹⁰⁶ The *Griswold* decision, a 6-2 vote with six separate opinions, laid the foundation for rights to privacy in the marital bed and ultimately a right to privacy in reproductive decisions, most prominently *Roe v. Wade*.¹⁰⁷ Our direction, of course, is to find the path to workplace rights to privacy on behalf of workers. This road has landmarks in the Coors Brewery case¹⁰⁸ and the question of

102. *Id.* at 507 (Black, J., dissenting).

103. *Id.* at 508 (Black, J., dissenting).

104. *Id.* at 509-10 (Black, J., dissenting) (footnote omitted).

105. *Id.* at 502 (White, J., concurring). Mr. Justice White argued that the Connecticut statute failed to pass the strict scrutiny test for laws abridging liberty under the Fourteenth Amendment. The statute failed because it was unnecessarily and overly broad in view of the law's stated objective which was to prevent the use of contraceptives by persons engaging in illicit sexual relations to the end that such relations would be discouraged. *Id.* at 506-07 (White, J., concurring).

106. *Id.* at 499 (Harlan, J. concurring).

I fully agree with the judgment of reversal, but find myself unable to join the Court's opinion.

. . . .

In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325. For reasons stated at length in my dissenting opinion in *Poe v. Ullman*, *supra*, [367 U.S. 497, 539-545.] I believe that it does.

Id. at 499-500 (Harlan, J., concurring).

107. 410 U.S. 113 (1973).

108. See Frederoc D. Sturdivant, *The Case of Adolph Coors Company, in THE CORPORATE SOCIAL CHALLENGE: CASES AND COMMENTARIES* 456-76 (4th ed. 1990).

polygraph testing¹⁰⁹ as well as in the federal act giving workers the right to see their personnel records.¹¹⁰

V. COMPARISON TO OTHER WESTERN NATION STATES AND THE EUROPEAN COMMUNITY

A. Privacy Rights in Germany

The notion that privacy is a fundamental right can be traced to Germany's Constitution, the Grundgesetz.¹¹¹ Article 10 of this "Basic Law" provides that the privacy of letters, posts, and telecommunications shall be inviolable.¹¹² A preface provided by German President Richard von Weizaecker in the amendment of the Grundgesetz, an amendment caused by German unification in 1990, underscores the importance of this basic right. It states,

"For more than forty years, the Basic Law has determined the development of the polity of the Federal Republic of Germany. In its area of application, it has bestowed on the citizens a life in liberty, democratic self-determination and personal responsibility, protected by law and justice."¹¹³

The Federal Data Protection Act (Bundesdatenschutzgesetz) is designed to protect the individual's privacy as to data that has been collected about this individual. This statute governs data collection, processing and dissemination of data by all public or quasi-public agencies and in a more select way also governs some data collection by private entities. Application of this law to private entities is restricted to data that are collected in a systematic fashion or automatically and/or are processed or stored by automatic/electronic means.¹¹⁴

Germany has an extensive system of Data Protection officials (Datenschuetzer) at the federal, state, county and in most public institutions down to the department level. There is formal training for such officials, and there are formal associations/committees formed by the individuals who have such a job or authority component assigned to them. They generally have subpoena powers, rights to examine, secure data and can make recommendations regarding storage and disposal.

109. See the Employee Polygraph Protection Act of 1988, § 3, 29 U.S.C. § 2001 (1994) (prohibiting most employers from using polygraphs in pre-employment testing).

110. See, e.g., Privacy Act of 1974, § 3, 5 U.S.C. § 552a (1994). The purpose of the Privacy Act was to allow individuals to learn what information the government maintains on them and to correct or amend any false data. Additionally, the act enables public and private sector employees to review their personnel files.

111. Parliamentary Council F.R.G. (1949, May 23) Basic Law F.R.G.: Article 10.

112. See *id.*

113. Preface to BASIC LAW for the Federal Republic of Germany as amended by the Unification Treaty, 31 August 1990 and federal statute of 23 September 1990, FEDERAL LAW GAZETTE II at 885.

114. BDSG [Bundesdatenschutzgesetz], December 1990.

While most of Germany's efforts to secure privacy used to be restricted to assuring privacy in relation to public institutions, major inroads have been and continue to be made for privacy in the public sector. Current laws for privacy in the workplace rest on two pillars. The first pillar is individual-specific and emanates from the Bundesdatenschutzgesetz (BDSG) (literally translated this is the federal law for the protection of data). Aside from the BDSG, there are also a number of sectoral laws and relevant labor court rulings such as those providing for examination of employment and other files by the employee. One requirement for the employer who systematically gathers data is that the data be "objectively" necessary for the regular conduct of business.¹¹⁵ Even if the employee grants permission, objective need must still be shown. Yet another basis is found in the Personnel Records Law.¹¹⁶ This goes beyond the requirement that data collection is systematic and/or automatic. It includes all collections of data about an employee. The employee has the right to examine the record. Also, the employee has the right to receive a printout, in an easily understood format, of all the data kept on him or her.¹¹⁷ The employee has the further right to add items to the record; and, in some cases, the employee may have the record corrected.¹¹⁸

The second pillar is a collective-legal protection provided by the right of participation in data collection and privacy protection granted to the workers' councils (Betriebsrat) found in German industry. This right is further enhanced by specific arrangements found in union-industry contracts and many company specific agreements.¹¹⁹ The Betriebsrat has the right to determine whether the employer is in compliance with the laws. It also participates in the design of data collection instruments, e.g., questionnaires. Co-determination in regard to the control of observation equipment is also provided; this includes cameras and PC-based controls etc.¹²⁰ However, even though the law prescribes objective need, some difficulty exists as to whether that standard is followed in actual practice.¹²¹ There is a "gray area" that justifies additional legislation. An Employee Privacy Law has been in development, but it has yet to be enacted.¹²²

115. *See id.*

116. PARA. 83 BetrVG.

117. *See id.*

118. *See id.*

119. *See id.*

120. *See id.*

121. *See id.*

122. Directive 95/46/EC of the Parliament and of the Council of 24, 24 Oct. 1995.

B. Privacy Rights in the European Community

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to processing of personal data and on the free movement of such data provides an important foundation for privacy in Europe and is likely to lead to major advances in member countries and those countries that aspire to membership. It states that:

1. In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.
2. Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with the protection afforded under paragraph 1.¹²³

C. Privacy Rights in Austria

As co-signer of the European Convention for the Protection of Human Rights and Basic Rights (1958), Austria has taken steps to implement privacy rights. The Austrian Datenschutzgesetz guarantees each citizen privacy of data collected and stored by all public entities. In one case challenging application of this law, the Austrian Supreme Court affirmed the "protection of privacy [as] an inborn right."¹²⁴ However, in the same 1978 ruling, the court declared that although privacy is a basic right it must be balanced against all interests endangered as well as the interests of the collective, i.e., the employer and the larger society.¹²⁵

D. Privacy Rights in Canada

Canada's Federal Privacy Law (1982) applies to all federal government departments, most federal agencies, and some federal Crown corporations.¹²⁶ The Privacy Commissioner of Canada oversees the Act, and has powers to receive complaints, conduct investigations, and attempt to resolve disputes, among others.¹²⁷

The private sector is another matter entirely. Only Quebec has a comprehensive privacy act for the private sector. Quebec's Act Respecting the Protection of Personal Information in the Private Sector¹²⁸ provides a detailed framework for the collection, use and disclosure of personal information. Commission on Access to Informa-

123. Art. 8 Abs.2 der Europäischen Konvention zum Schutz der Menschenrechte und Grundfreiheiten (BGB1.Nr.210/1958).

124. OGH 24.10.1978 SZ 51/146.

125. *See id.*

126. Privacy Act, Legislative History: 1980-81-82-83, c.111, SCU II "1."

127. *See id.*

128. Task Force on Electronic Legislation (1998). Privacy: The Protection of Personal Information. *Legislation.*

tion is responsible for conducting investigations and settling disputes and generally overseeing the Act's enforcement.¹²⁹

In the other Provinces, protection of privacy in the private sector is sporadic and uneven. Many industries are not subject to any rules regarding the collection, use and disclosure of personal information. A few industries, however, are covered by what the Privacy Commissioner has termed "a patchwork" of laws, regulations and codes.¹³⁰ The patchwork is made of various federal and provincial laws that result in incomplete and possibly inconsistent protections. Effective as the patchwork may be in particular sectors, it does not establish common principles. This incompleteness causes uncertainty for business managers and spotty protection for consumers. This patchwork becomes even more inadequate in the face of new developments in electronics, computers, and communications technology.¹³¹

However, the Canadian government has recently introduced legislation to protect privacy in the private sector.¹³² This proposal would apply to all personal information in the federally regulated sector, i.e., banking, telecommunication, transportation. Interestingly, the bill was drafted based upon consensus among consumers and industry regarding the need for and the nature of such legislation.¹³³ In addition, the government actually conducted research into the subject.¹³⁴

Most efforts at privacy legislation begin with "fair information practices," which can be understood as sets of privacy principles. Fair information practices are guidelines for the collection, use, disclosure, retention and disposal of personal information. Sets of fair information practices vary, but they usually include the following principles:

- ensuring public awareness and transparency (openness) of information policies and practices
- establishing necessity and relevance of the information collected.
- building in finality (establishing the uses of the information in advance and eventually destroying it).
- identifying the person who has responsibility for protecting personal information within an organization.
- getting informed consent from the individual.
- maintaining accuracy and completeness of records.
- providing access to the information and a right of correction.

129. *See id.*

130. Privacy Commissioner of Canada, Rep. Fed. Commission CAN. 1998.

131. *See id.*

132. *See id.*

133. *See id.*

134. *See id.*

VI. DISCUSSION OF WORKPLACE PRIVACY

A. Essential Elements of Privacy

When Samuel Warren and Louis Brandeis announced their novel thesis in 1890,¹³⁵ the authors saw the advent of modern newspapers and photography as a leap in technology that threatened the privacy of ordinary citizens.¹³⁶ Their main points can be summarized in these words:

they argued that the existing common law recognized a principle of "inviolable personality" which could be invoked to protect the privacy of the individual. Although arguing eloquently for explicit recognition of a right to privacy, they offered little in the way of definition, beyond locating privacy as part of the more general right to the immunity of the person—the right to one's personality.¹³⁷

In 1905, the Georgia Supreme Court "decisively recognized" the common law right of privacy in a case that was to become a landmark.¹³⁸

Dean William Prosser addressed privacy in 1960 in a well-known law review article¹³⁹ and declared that it had four elements: "The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common . . ." ¹⁴⁰ Despite vigorous debate about the nature, definition, and value of a common law concept of privacy,¹⁴¹ the common law tort of invasion of privacy is now understood to apply in four distinct but interrelated situations. The right of privacy may be invaded by: (1) "unreasonable intrusion upon the seclusion of another,"¹⁴² (2) "appropriation of the other's name or likeness,"¹⁴³ (3) "unreasonable publicity given to the other's private life,"¹⁴⁴ or (4) "publicity that unreasonably places the other in a false light before the public."¹⁴⁵ Clearly, from the perspective of the authors of the *Restatement of Torts*, Dean Prosser's analysis from his 1960 article carried the debate.¹⁴⁶

135. See Warren & Brandeis, *supra* note 96.

136. See *id.* at 195.

137. Kim, *supra* note 97, at 682-83 (citation omitted).

138. See *id.* at 683 n.53.

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

140. *Id.* at 389.

141. For an excellent discussion as well as a collection of this literature, see Kim, *supra*, note 97.

142. RESTATEMENT (SECOND) OF TORTS § 652A (1977).

143. *Id.*

144. *Id.*

145. *Id.*

146. See, e.g., Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964). Bloustein argues that the single interest, protection of human dignity, underlines the broad diversity of cases collected under invasion of privacy. See *id.* at 1000-03.

In a parallel but not unrelated development, the concept of privacy has been recognized in constitutional jurisprudence.¹⁴⁷ Although not named in the Constitution, a right to privacy has been held protected by the "penumbras" of the Bill of Rights, as well as by several specific amendments.¹⁴⁸ "Penumbra" is defined as "a space of partial illumination (as in an eclipse) between the perfect shadow on all sides and the full light."¹⁴⁹ The word itself is derived from the Latin words meaning "almost shadow."¹⁵⁰ Due to Justice Douglas's opinion, the word has come to mean "a body of rights held to be guaranteed by implication in a civil constitution."¹⁵¹ In a sense, these would be rights that exist on the fringe, in the partial light or shadow from the emanations of the directly granted rights in the Bill of Rights. Consequently, when workers seek protection in alleged rights of privacy, it is no stretch to say that they are seeking shelter in the shadows of the law.

B. Reduced Expectations of Privacy in the Workplace

Clearly, a person has an expectation of privacy in her person and in her home.¹⁵² But what expectation of privacy exists for a worker in a workplace belonging to the employer? Whatever, they are; surely, such expectations must be lesser than the expectations the worker enjoys in her home. In 1890, Warren and Brandeis wrote that the right of privacy was a "general right of the individual to be let alone."¹⁵³ But the employer when it provides work has certain legitimate interests in monitoring the employees' performance and in NOT just letting them alone. For instance, the employer wants to monitor productivity, employee morale, and its ownership interest (property) to protect it from pilferage and sabotage.

147. One of the most unfortunate results of this parallel jurisprudence is that public sector employees enjoy more protection against invasions of their privacy than do comparable private sector employees. See, e.g., Laura B. Pincus & Clayton Trotter, *The Disparity Between Public Sector and Private Sector Employee Privacy Protections: A Call for Legitimate Privacy Rights for Private Sector Workers*, 33 AM. BUS. L.J. 51 (1995). Professors Pincus and Trotter conclude, "[c]onsistent federal protection of privacy in the private sector is warranted" and note that it has been called for by various authors since the mid-1970s. *Id.* at 55.

148. See *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965).

149. MERRIAN WEBSTER'S COLLEGIATE DICTIONARY 860 (10th ed. 1993).

150. *Id.*

151. *Id.*

152. The Fourth Amendment to the United States Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

153. Warren & Brandeis, *supra* note 96, at 205.

Courts that have rendered decisions in this area have tended to use a balancing of interests approach.¹⁵⁴ Also, courts have noted that a long history of intensive government regulation of an industry, say banking, would tend to weaken expectations of privacy of officials working in such industries.¹⁵⁵ One author states “[t]he overall purpose of the business of the employer and the nature of the employee’s specific job are relevant considerations in determining which intrusions violate socially sanctioned claims of privacy.”¹⁵⁶ Although avoiding the word “balancing” entirely, the author also declared that “the more closely an employer’s inquiries or practices trench on interests at the recognized core of individual privacy, the greater the need for some specific justification.”¹⁵⁷ Yet, the initial inquiry for the court, wrote the same commentator, was to determine “general societal understandings” of privacy.¹⁵⁸

As judges wrestled with balancing the legitimate interests of employers in workforce supervision with the equally important rights of workers to be free from unnecessary and outrageous intrusions, workers took their complaints in increasing numbers to the courtrooms of America. We used West Publishing key number 8, invasion of personal safety, comfort or privacy, as a proxy for the amount of litigation in the privacy area. Turning to the Decennial Digests published by West, we measured the number of pages under key number 8 and found a dramatic increase in privacy cases between 1947 and 1996. This material indicated an absolute increase in privacy cases. We also wanted to know whether privacy cases had increased relative to the increase in litigation over the same time period. Consequently, we determined the total number of pages in the same Decennial Digests. We divided the number of pages for key number 8 by the total number of pages in each digest in order to determine the relative importance of privacy cases to litigation in the U.S. generally. We found that privacy cases nearly doubled in significance as part of the overall litigation between 1947 and 1996.

C. Problem Areas for Workplace Privacy Concepts

Despite the conservative approaches to the right of privacy that have prevailed in most courts, courts have applied more caution in ruling against employees in several areas where the courts find that em-

154. See, e.g., Kim, *supra* note 97, at 698-709.

155. See, e.g., Gimbel v. Federal Deposit Ins. Corp. (*In re Gimbel*), 77 F.3d 593, 600 (2d Cir.); Katherine Scherb, *Administrative Subpoenas for Private Financial Records: What Protection for Privacy Does the Fourth Amendment Afford?* 1996 Wis. L. Rev. 1075, 1096-99 (discussing *Gimbel*).

156. Kim, *supra* note 97, at 707.

157. *Id.* at 706.

158. *Id.* at 705.

ployer actions may intrude upon the employees' right to be let alone.¹⁵⁹ The following sections address some of these areas in which employer actions have included some of the most blatantly intrusive inquiries into employee behavior and personal histories.

1. Drug Testing

Drug tests fall into five categories: random, periodic, suspicion-based, post-accident, and pre-employment. In some jurisdictions, mandatory random drug tests have, under certain circumstances, been held to be actionable invasions of privacy.¹⁶⁰ Generally, these decision support the observation that drug testing invades an employee's privacy if either: (a) safeguards are not incorporated into the tests to protect the employee's privacy; or (b) the test is used to reveal other private medical facts [besides drug use] especially when such facts are embarrassing and unrelated to workplace performance, e.g. pregnancy. Two lawyers that practice in this area summarize the state of the law in these words:

The analysis in these cases involves balancing employee and employer interests. To require an employee to disclose his drug status obviously involves some intrusion into the employee's right to be let alone. A court will weigh this invasion against the employer's need to know whether the employee is a drug user. Thus, drug testing may be an invasion in some settings (e.g., the entertainment industry) and not in others (e.g. the defense industry).¹⁶¹

Another author uses these words to capture much the same idea: "privacy norms are contextually determined."¹⁶² She goes on to argue that privacy "is not only culturally contingent, but relationally contingent as well, for the meaning of an apparent encroachment on the 'territories of the self' turns on the social relationship between the parties."¹⁶³

Courts, charged with administering the laws, seem less delicate in the manner in which they deal with privacy claims. For instance, Robert Gilmore, an engineer, had been a long-time employee of Mustang Fuel. Mustang, a company that had no drug testing policy, was acquired by Enogex, a company that did have a random drug testing program. Gilmore was randomly selected and ordered to have a drug test. He refused, claiming a right to privacy. He was fired. After his firing, Gilmore voluntarily submitted to a drug test (at the same hospital). His results were negative, but Gilmore stayed fired. He sued

159. See Steven C. Bennett & Scott Locke, *Privacy in the Workplace: A Practical Primer*, 49 LAB. L.J. 781, 784 (1998).

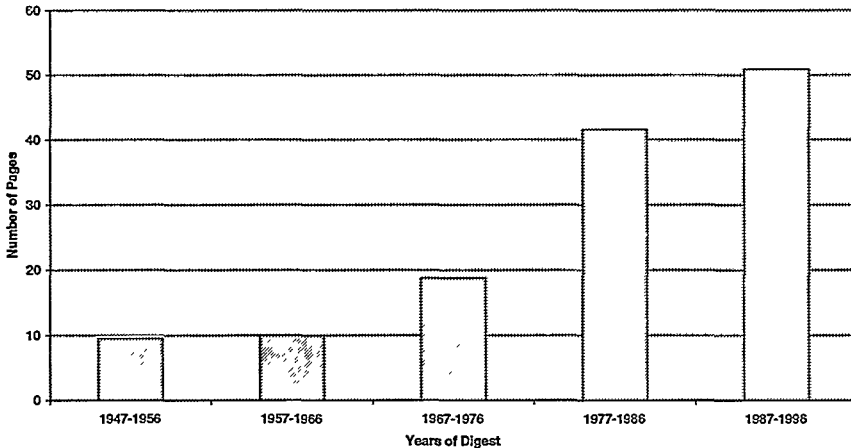
160. See, e.g., *Folmsbee v. Tech Tool Grinding & Supply, Inc.*, 630 N.E.2d 586, 590 (Mass. 1994); *Hennessey v. Coastal Eagle Point Oil Co.*, 609 A.2d 11, 19 (N.J. 1992).

161. Bennett & Locke, *supra* note 159, at 784 (citations omitted).

162. Kim, *supra* note 97, at 695.

163. *Id.* at 695.

PAGES OF KEY NUMBER 8,
INVASION OF PERSONAL SAFETY, COMFORT
OR PRIVACY



and lost. The Oklahoma Supreme Court upheld Enogex's right to impose random drug testing even though Gilmore was not in a safety-sensitive position and despite Gilmore's many years as a satisfactory employee.¹⁶⁴

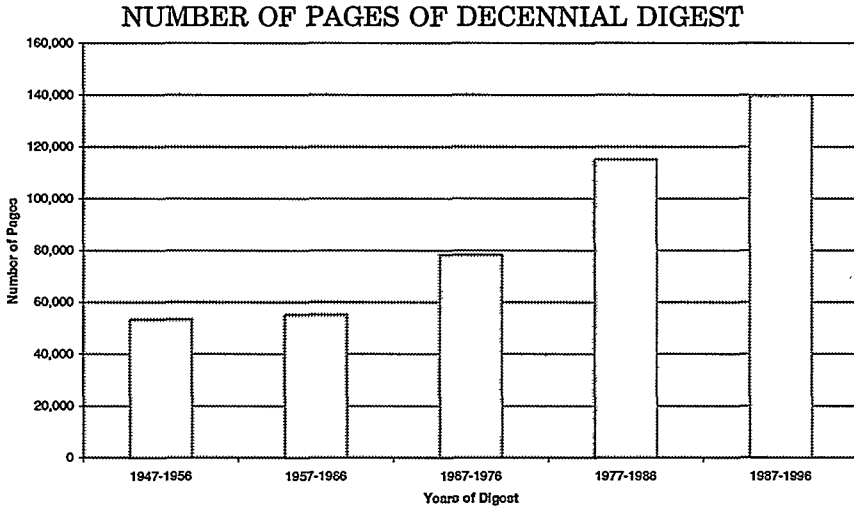
One review of the *Gilmore* decision stated: "Mr. Gilmore . . . lost his job . . . because he conscientiously objected to being tested, on grounds of privacy. It is debatable whether or not the Company's policy actually conduced toward a drug free workplace; but the Company's policy certainly did insure a workforce resigned to the surrender of its privacy."¹⁶⁵

An enormous growth in the testing of applicants and of incumbent employees by Corporate America for metabolites of certain controlled substances, primarily marijuana and cocaine was fostered by the so-called "War on Drugs." This drug screening triggered a batch of cases alleging violations of the right to privacy.¹⁶⁶ It also precipitated legislation: "Fifteen states have regulated workplace drug testing primarily to assure the accuracy of test results Montana limits applicant screening to safety sensitive jobs" and Iowa and Vermont "otherwise limit the screening of applicants" to insure that drug screens are done as a part of pre-employment medical examina-

164. See *Gilmore v. Enogex, Inc.*, 878 P.2d 360, 364 (Okla. 1994).

165. Matthew W. Finkin, *Employee Privacy, American Values, and The Law*, 72 CHI.-KENT L. REV. 221, 232 (1996) (citations omitted).

166. See *id.* at 230.



tions.¹⁶⁷ The supreme courts of Massachusetts, New Jersey and West Virginia have limited drug screening to safety sensitive positions.¹⁶⁸

2. Searching Employee Work Areas

Searches of employee work areas such as desks, lockers, and mail necessarily raise privacy concerns. Again the context and the relationship are important considerations. But the fact that an employer owns the desk or locker does not confer an unlimited power to search the same. The cases, however, are in some disarray. For instance, one court held that a jury could find an employer liable for examining confidential materials found on top of an employee's desk.¹⁶⁹ But in another decision, an employer who discreetly and covertly searched an employee's unlocked desk, located in an open area, for employee-owned documents was held not liable for invasion of privacy.¹⁷⁰ Another court held that searching an employee's locker to which the company allowed the employee a key might invade his privacy.¹⁷¹ Yet,

167. *Id.* at 230-31.

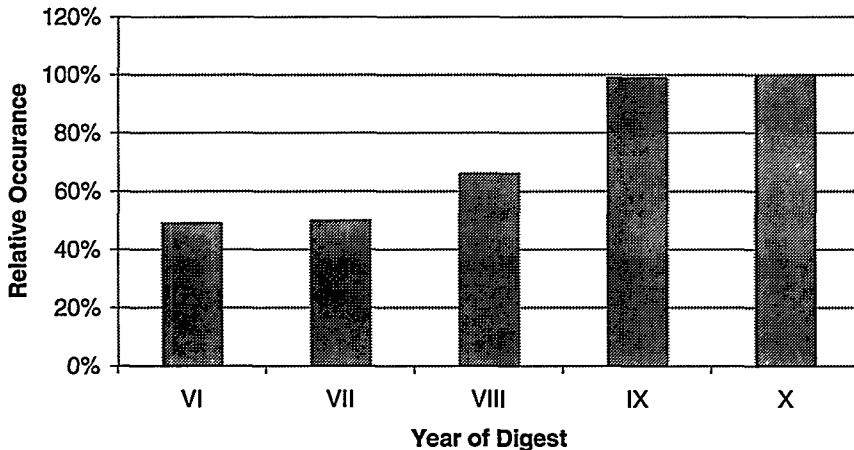
168. *See id.* at 231 (citing *Webster v. Motorola, Inc.*, 637 N.E.2d 203, 208 (Mass. 1994); *Hennessey v. Coastal Eagle Point Oil Co.*, 609 A.2d 11, 21 (N.J. 1992); *Twigg v. Hercules Corp.*, 406 S.E.2d 52, 55-56 (W. Va. 1990)).

169. *See Doe v. Kohn, Nast & Graf, P.C.*, 862 F. Supp. 1310, 1326 (E.D. Pa. 1994).

170. *See O'Bryan v. KTIIV Television*, 868 F. Supp. 1146, 1159 (N.D. Iowa 1994), *aff'd in part, rev'd in part*, 64 F.3d 1188 (8th Cir. 1995).

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

RELATIVE OCCURRENCE OF KEY NUMBER 8,
INVASION OF PERSONAL SAFETY, COMFORT
OR PRIVACY



other courts have held that searching an employee's lunch bucket¹⁷² or a car parked on the company lot¹⁷³ would not.

Although the Fourth Amendment comes into play only when government actions threatens an individual's "reasonable expectations of privacy,"¹⁷⁴ developments under the Constitutional standard are a parallel development and shed some light on social expectations. The Fourth Amendment threshold test has been treated as a two-prong inquiry, asking first whether the individual "exhibited an actual (subjective) expectation of privacy" and second, whether that expectation is "one that society is prepared to recognize as 'reasonable.'"¹⁷⁵ In a Fourth Amendment challenge to an employer's search of an employee's desk and file cabinets, the Supreme Court held that an employee had a reasonable expectation of privacy when the employee did not share the desk or file cabinets, had occupied his office for more than seventeen years, and had kept personal materials in his office.¹⁷⁶ Granted the Fourth Amendment brings its own weight and history to a decision, we nonetheless find it difficult to reconcile these cases since the starting point for all of them is an expectation of privacy based upon the same U.S. society.

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

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

174. *Terry v. Ohio*, 392 U.S. 1, 9 (1968).

175. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

176. See *O'Connor v. Ortega*, 480 U.S. 709, 718-19 (1987).

3. *Surveillance of Employees*

Surveillance of employees takes many forms.¹⁷⁷ Everything from monitoring telephone calls,¹⁷⁸ checking e-mail,¹⁷⁹ eavesdropping on conversations,¹⁸⁰ and using hidden cameras¹⁸¹ has been subject at various times to claims of invasion of privacy. Surveillance alone will not violate an employee's right to privacy. Again, the critical issue is whether the employee has a reasonable expectation of privacy.¹⁸² We will examine some of the issues in the following subsections.

a. *Capturing Conversations*

A starting point for this discussion is the 1968 federal law on wiretapping that was designed to regulate interception of wire and oral communication.¹⁸³ The Electronic Communications Privacy Act (ECPA) of 1986 was an amendment to the 1968 wiretap statute and was created to regulate and control forms of electronic communications that had been invented since 1968, primarily computer systems.¹⁸⁴ Voice-activated recording machines attached to company

177. A survey of more than 1000 businesses by the American Management Association International revealed that two-thirds of U.S. businesses eavesdrop on their employees. Liz Stevens, *Feeling Watched? No Wonder, Snooping On Employees Commonplace and Legal*, THE SPOKESMAN-REVIEW, Oct. 6, 1999, at A1.

178. See, e.g., *Watkins v. United Parcel Serv., Inc.*, 797 F. Supp. 1349 (S.D. Miss. 1992), *aff'd*, 979 F.2d 1535 (5th Cir. 1992); *Jackson v. Nationwide Credit, Inc.*, 426 S.E.2d 630 (Ga. Ct. App. 1992).

179. See, e.g., *Bohach v. City of Reno*, 932 F. Supp. 1232 (D. Nev. 1996); *Smyth v. Pillsbury Co.*, 914 F. Supp. 97 (E.D. Pa. 1996).

180. See, e.g., *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176 (7th Cir. 1993); *Speer v. Ohio Dep't of Rehabilitation & Correction*, 624 N.E.2d 251 (Ohio Ct. App. 1993); Steve Casimiro, *The Spying Game Moves into U.S. Workplace*, FORTUNE, Mar. 30, 1998, at 152-53. Casimiro describes offices being equipped with microphones hidden in pens, warehouses, and stockrooms; he also discusses hidden video cameras in employee break rooms. Technology has made the tools for eavesdropping cheap, small, powerful, and accessible. A 1997 survey by the American Management Association found that nearly two-thirds of employers conduct electronic surveillance of employees and that about one-quarter of those conducting surveillance do not inform their employees. David C. Yamada, *Voices from the Cubicle: Protecting and Encouraging Private Employee Speech in the Post-Industrial Workplace*, 19 BERKELEY J. EMP. & LAB. L. 1, 16 (1998) (quoting *Spying on Workers Common and Usually Legal, Group Reports*, BOSTON GLOBE, May 23, 1997, at A3).

181. See, e.g., *Saldana v. Kelsey-Hayes Co.*, 443 N.W.2d 382, 384 (Mich. Ct. App. 1988) (holding that the use of a high power camera lens to look into an employee's home did not violate a right to privacy).

182. See Bennett & Locke, *supra* note 159, at 785.

183. The Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 505, 82 Stat. 197 (1968).

184. The Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, § 101, 100 Stat. 1848, 1851 (1986), amended Title III of The Omnibus Crime Control and Safe Streets Act of 1968.

telephones have been held to generate liability and did not qualify under the "business extension" exception to federal law.¹⁸⁵ Conducting surveillance in a restroom invades privacy,¹⁸⁶ but conducting similar surveillance outside the entrance to a restroom does not, in the absence of any person being seen undressed.¹⁸⁷

b. *Monitoring Telephone Calls*

Federal law prohibits the willful interception of any "wire, oral, or electronic" communication through the use of "any electronic, mechanical or other device" except under specified circumstances.¹⁸⁸ Thus, eavesdropping on an employee's telephone conversations is broadly prohibited. Two exceptions to this blanket prohibition are generally applicable to employers. First, interception is expressly permitted when "one of the parties to the communication has given prior consent."¹⁸⁹ Second, the business extension exception excludes any component of a "telephone or telegraph instrument" used in the ordinary course of its business from the definition of "electric, mechanical or other device." Consequently, monitoring with a "business extension" does not violate the law. Interceptions of telephone calls that are not covered by these exclusions can result in fine and imprisonment and also subject the employer to civil liability.

The consent exception, although seemingly straight-forward, has been held to include so-called "implied consent." If an employee is aware that the employer monitors or records telephone conversations on its lines, yet uses such a line, "most courts" will find implied consent and no liability attaches under federal law.¹⁹⁰ As for the business extension exception, courts have held that clandestine, indiscriminate monitoring that picks up both personal and business calls does not qualify because such monitoring is not a valid part of a business operation.¹⁹¹

185. See *Pascale v. Carolina Freight Carriers Corp.*, 898 F. Supp. 276 (D.N.J. 1995).

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

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

188. 18 U.S.C. § 2511(1)(a) (1994).

189. 18 U.S.C. § 2511(2)(d) (1994).

190. William C. Martucci & Jeffrey M. Place, *Privacy Rights and Employee Communication in the Workplace*, EMPLOYMENT REL. TODAY, Summer 1998, at 109, 110.

191. See, e.g., *Sanders v. Robert Bosch Corp.*, 38 F.3d 736 (4th Cir. 1994). *But cf. Knight v. City of New Orleans*, No. CIV.A. 89-3409, 1991 WL 126387, at *1 (E.D. La. July 1, 1991). In that case, a police chief was fired when his racial comments, captured by a telephone monitoring system, were made public. In the ensuing litigation, the recording was held legal because the monitored conversation was a business one and the chief was aware of the department's policy of recording telephone conversations.

c. *E-mail and Computer Monitoring*

Federal law treats telephone and e-mail communications very differently. As mentioned above, federal law prohibits the interception of private messages. However, once a message is stored in an electronic format, a different federal statute applies. That statute prohibits unauthorized access to electronically stored messages but also provides a blanket exception for service providers.¹⁹² Consequently, employees have very little chance of prevailing on a privacy violation in the area of computer e-mail.

Unlike telephone conversations that disappear into the ether in the absence of any recording device, e-mail and voice mail messages are routinely and of necessity saved on computer hard drives, and frequently backed-up to tape or some other form of long-term storage device. System administrators or anyone else with access to these sources are free to review all of the stored messages without any need for any individual user passwords. Courts have held that employers qualify as "service providers" and have also held that employees cannot have any "reasonable expectation" of privacy in any messages sent over such systems.¹⁹³

Although our reading of the cases convinces us that the dominant view is one of no expectation of privacy, there is no consensus in the courts that no one could, under any circumstances, ever have a reasonable expectation of privacy in either e-mail or voice-mail.¹⁹⁴

d. *Regulating Personal Associations*

Numerous employers have policies that address some aspect of their employees' personal associations off the premises. Litigation not infrequently follows job actions taken against employees who violate such policies or who commit off-duty acts that the employer finds objectionable. Recent examples include employees who have been fired for living with someone of the opposite sex without benefit of marriage,¹⁹⁵ smoking,¹⁹⁶ drinking,¹⁹⁷ and motorcycling.¹⁹⁸ As Professor Dworkin, an expert in this area, has concluded:

192. See 18 U.S.C. § 2701(c)(1) (1994).

193. See, e.g., *Bohach v. City of Reno*, 932 F. Supp. 1232 (D. Nev. 1996); see also *Payne v. Norwest Corp.*, 911 F. Supp. 1299 (D. Mont. 1995) (holding that voice mail was not protected from recording and dissemination to others).

194. See *Martucci & Place*, *supra* note 190, at 114 and cases cited therein.

195. See, e.g., *Meltebeke v. Bureau of Labor & Indus.*, 903 P.2d 351 (Or. 1995) (plaintiff used theory of religious harassment to recover when employer told him he was a sinner and going to hell because he lived with his girlfriend); see also *State ex rel. Johnson v. Porter Farms, Inc.*, 382 N.W.2d 543 (Minn. Ct. App. 1986).

196. See, e.g., *City of North Miami v. Kurtz*, 653 So. 2d 1025 (Fla. 1995). The tobacco industry fired up a campaign for state laws protecting employees who smoked off the job. This campaign has been expanded to cover other off-duty behaviors. Now, 29 states have enacted some version of off-the-job privacy protection laws.

At present, marriage discrimination statutes, lifestyle protection statutes, and Title VII's protection against religious discrimination offer employees the most likely avenues to successful vindication of their associational rights. Common law theories, including the tort of invasion of privacy, have proved less successful although they are growing in use and success.¹⁹⁹

VII. CONCLUSION

A. Prudence of Using Law to Guarantee Privacy

Writers and law professors and judges do not agree on any specific definition of "right to privacy."²⁰⁰ Some noted scholars have argued that the entire construct is a mistake; others have declared that it is so unwieldy that it collapses from its own weight; and still others have praised it in almost exalted terms as necessary to human dignity. Other writers have declared that it is only derivative, coming from other better defined torts and concepts; and some have dismissed it as a "petty tort."²⁰¹ We are reminded of the limits of law to effect social changes as we read the cases and commentary.²⁰² Law is a social institution, and in many ways it cannot rise above its source.

B. Problems of Social & Human Costs Left Out of Business Equations

The double entry accounting system used in American business has no place for so-called "externalities" on the balance sheet or income statement. Thus, the increase in human suffering, alcohol abuse, suicides, batteries, and homicides that flow in the wake of plant

Terry Morehead Dworkin, *It's My Life Leave Me Alone: Off-the-Job Employee Associational Privacy Rights*, 35 AMER. BUS. L.J. 47, 51 (1997).

197. See, e.g., *Best Lock Co. v. Review Bd.*, 572 N.E.2d 520 (Ind. Ct. App. 1991).

198. See, e.g., Lewis L. Maltby & Bernard J. Dushman, *Whose Life Is It Anyway Employer Control of Off-Duty Behavior*, 13 ST. LOUIS U. PUB. L. REV. 645, 646 n.7 (1994).

199. See Dworkin, *supra* note 196, at 98.

200. See Kim, *supra* note 97, at 683-85 and works cited therein.

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

I suspect that fascination with the great Brandeis trade mark, excitement over the law at a point of growth, and appreciation of privacy as a key value have combined to dull the normal critical sense of judges and commentators and have caused them not to see the pettiness of the tort they have sponsored.

Id. at 328.

202. Lord Stowell stated:

Courts of Justice do not pretend to furnish cures for all the miseries of human life. They redress or punish gross violations of duty but they go no farther; they cannot make men virtuous; and as the happiness of the world depends upon its virtue, there may be unhappiness in it which human laws cannot undertake to remove."

Evans v. Evans, 161 Eng. Rep. 466, 477 (1790)

closings and layoffs do not reflect adversely on the financial statements of the companies that fire people and move plants/mills to third world countries. If business performance is measured in quarterly and annual financial reports, as virtually all of it is these days, then businesses are free to have no conscience or social responsibility.²⁰³

My initial thesis was that workers are striving to erect a privacy structure in an effort to offset the decline in civility in U.S. society. If that is so, one of the largest causes of incivility in this country is business conduct.²⁰⁴ The principal apologists for insensitive behavior toward workers (and the environment) are the neo-classical economists, many from the University of Chicago school of thought, who legitimize greed and indifference toward human suffering. Ultimately, this behavior is sanctified by accountants who fail to see beyond their beloved double entry system and GAAP (Generally Accepted Accounting Practices).

C. Decline of Civility & Increased Claims of Workplace Privacy: Correlation, Cause or Coincidence?

A wag once declared that in the United States the incidence of cancer correlates almost perfectly with milk drinking. His point was that correlation and causation are two entirely different concepts, even though they are sometimes conflated in people's thinking. Thus, even if we were to quantify a decline in civility and an increase in worker's privacy claims, it might be merely coincidence or simple correlation. Consequently, we have only advanced a hypothesis that workers are seeking shelter from incivility in the workplace by making claim to workplace privacy rights.

D. Root Cause In At-will Rule & Need For Workers' Bill of Rights?

Another author has suggested that the real cause of workplace problems with privacy is the underlying dominant rule of employment in the United States, employment-at-will.²⁰⁵ This author details the relationship between these doctrines in the following words:

Although the common law tort of invasion of privacy *does* offer protection against all manner of unreasonable intrusions on employee privacy, its appli-

203. See, e.g., Oliver Edwards, *Will Europe Reform its Corporate Governance?*, EUROBUSINESS, Apr. 1999, at 65-66 in which the author interviews business guru Peter Drucker. Drucker asserts that the key to financial success in the U.S. and U.K. is that corporations exist for the benefit of their shareholders. He apparently believes that Japan, Germany and Italy face financial ruin unless they convert to this corporate dogma.

204. See, e.g., MARTHA BANTA, *TAYLORED LIVES: NARRATIVE PRODUCTIONS IN THE AGE OF TAYLOR, VEBLLEN, AND FORD* (1993).

205. See Kim, *supra* note 97.

cation in the workplace is complicated by the conflicting right of the employer to terminate the relationship at will. Most courts that have considered the issue agree that an employer may be liable in tort for unreasonable intrusions on employee privacy *after the fact* However, when the employer gives notice *in advance* that it intends to engage in the same intrusive practices, the protection offered by the common law tort is problematic. If the employee accedes to the employer's intrusive practices (or merely continues to work after receiving notice), her employer will likely assert that she consented to the intrusion as a defense to her claim that her privacy was wrongfully invaded. If, on the other hand, she objects to the intrusion and is fired as a result, the common law privacy tort provides no relief, because no invasion of her privacy has occurred. She has suffered the loss of her job, but no loss of privacy. It is at this point that the interpretation of the at-will doctrine becomes crucially important. If applied strictly, the employee cannot recover for the loss of her job either, and will be left without recourse, regardless how invasive the employer's threatened actions were, or how justified her refusal to comply with her employer's demands.²⁰⁶

E. Circularity of Civility & Privacy: No Shelter Here

If the law were to provide a meaningful refuge for lack of civility in the workplace, it would need to be both independent of the declining level of civility and able to provide a bulwark against the decline pegged to an independent standard. Unfortunately, the current state of the law regarding the so-called right to privacy does neither. The benchmark for the right to privacy is the social standard or norm of civility.²⁰⁷ Consequently, when civility drops in the U.S. society, so too does the protection provided by the law. The result is that the refuge provided is somewhat illusory at least in general legal theory.

The tort of invasion of the right of privacy requires an "outrageous" invasion of a "reasonable expectation" of privacy. In both the question of outrage²⁰⁸ and the issue of reasonableness, the only standards are those brought to these issues from the society. The result, as summarized above, is that the current law does not provide a meaningful shelter from the nationwide decline of civility. As one authority movingly declares:

206. *See id.* at 675-76 (emphasis supplied) (footnotes omitted).

207. An interesting illustration of how social norms actually can be more effective than regulation is discussed in Michele L. Tyler, *Blowing Smoke: Do Smokers Have a Right? Limiting the Privacy Rights of Cigarette Smokers*, 86 GEO. L.J. 783, 808-11 (1998). She notes that a significant number of smokers agree that they should not smoke in the presence of non-smokers and that many smokers voluntarily refrain from smoking at work or in many indoor public places. Ms. Tyler concludes that a civility norm "is almost in place with regard to many indoor public places." *Id.* at 809.

208. *See Finkin, supra* note 165. Finkin states succinctly, "[t]he inescapable conclusion is that what the law of intrusion actually regulates is not privacy, but outrage. The law protects freedom from emotional distress, not freedom of informational control." *Id.* at 228. (citation omitted).

A robust legal commitment to privacy would recognize that all the above predicate conditions are invasive to be surveilled [sic] by a hidden camera wherever one sits, to have one's desk rifled for whatever is read, to be questioned about one's private affairs however seemingly trivial and it would then require a showing of a specific business need sufficient to overcome that intrusion, which condition may or may not have been satisfied in these cases. But such is not the law.²⁰⁹

Some writers have suggested codes of privacy.²¹⁰ That idea is beyond the scope of this paper. However, we believe that it merits serious further research. One obvious advantage of such an approach would be to level the current privacy inequity between public sector workers and private sector workers. Another advantage would be to disconnect the law of privacy from the declining American norms of civility. Our tentative proposal would be to examine and move toward advocating creation of a federal worker's bill of rights, predicated upon the Commerce Clause²¹¹ that, among other things, would:

(a) guarantee employment termination only for good cause after a probationary period of six months;²¹²

(b) limit drug testing to safety-sensitive positions, security-sensitive positions, and for good cause;

(c) limit searches of employee desks, lockers, lunch buckets, and automobiles to situations where legitimate business reasons outweigh the invasion;

(d) require all monitoring of employees be with both notice to employees and consent of employees; and

(e) include speech protections for employees with exceptions only for disloyal, disruptive, insubordinate, and legally unprotected types of speech.

Otherwise, the tendency of the law of privacy to decline in tandem with the declining American civility standards combined with the lopsided power granted employers by the employment-at-will rule will continue to rob American workers of their human dignity. Our review of the state of privacy laws in Germany, Canada, and the European Community suggests that those countries lead the United States in protecting privacy, mainly because of national concern and legislation. We believe that in the near term American workers will continue to

209. *See id.* at 228-29.

210. *See, e.g.*, Kevin J. Conlon, *Privacy in the Workplace*, LAB. L.J., Aug. 1997, at 444, 447-48 (suggesting an eight point list of legislative reforms to protect employee privacy in the workplace; Yamada, *supra* note 180, at 58 (listing a Model Private Employee Free Speech Statute); Kevin J. Baum, *Comment: E-Mail in the Workplace and The Right to Privacy*, 42 VILL. L. REV. 1011, 1036-40 (1997) (discussing considerations and provisions that should be in any e-mail monitoring policy).

211. U.S. CONST. art. I, § 8, cl. 3.

212. MODEL EMPLOYMENT TERMINATION ACT § 3 (1991) (proposing a one-year waiting period before an employee is entitled to protection of "good-cause" standard).

increase their use of the judiciary to try to establish meaningful protections against the incivility and outrageous invasions of privacy that they encounter in the workplace. However, until and unless there is meaningful law reform, American workers will be forced to choose between their dignity and their economic well being.