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Privacy for the Working Class: Public Work and Private Lives

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Abstract

Privacy has become the law's chameleon, simultaneously everywhere and nowhere. This is particularly true of the workplace where employees often seek some private space but where the law, particularly the formidable employment-at-will rule, typically frustrates that search. As the workplace has expanded both in its scope and importance, additional concerns have been raised about an employer's potential reach outside of the workplace. In this symposium contribution, I explore the privacy issue by asking a fundamental question: what do employees deserve? My answer is that, as a matter of policy, we ought to concede privacy issues as the employer's domain at the specific workplace. This is, in part, because for most employees workplace privacy is not a central concern and the justifications for broad protections of workplace privacy are often quite weak. While conceding the workplace as the employer's domain, I also advocate creating a strict barrier to employer encroachments outside of the workplace so that employers would not be able to interfere with the off-work activity of their employees absent some compelling justification. This would include circumstances in which employers provide employees with computers or other gadgets that employees are permitted to use outside of the workplace.

Privacy for the Working Class: Public Work and Private Lives

Michael Selmi*

I. INTRODUCTION

At the turn of the twenty-first century, privacy has become the law's chameleon, seemingly everywhere and nowhere at the same time. The recent outpouring of privacy literature touches on many constitutional doctrines, including the mainstay in judicial hearings of the right to abortion, as well as search and seizure under the Fourth Amendment.¹ The hugely controversial Patriot Act, passed in the aftermath of September 11th, has stirred up privacy concerns among a broad array of groups, and in recent years Congress has passed numerous laws protecting privacy interests ranging from medical data to financial information and much in between.² Privacy concerns are seemingly everywhere these days.

Yet, despite all of this attention, the law surrounding privacy, and the basic definition of privacy, retains the enigmatic quality it has always had. Many trace the origins of privacy within the law to the seminal article by Brandeis and Warren entitled, "The Right

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² Professor of Law, George Washington University Law School. An earlier version of this paper was presented at the Examining Privacy In the Workplace Symposium held at Louisiana State University Law Center, where I benefited from the spirited comments from all of the participants. I also benefited from a faculty workshop at the University of Connecticut Law School. I am grateful to Matthew Finkin and Charlie Craver for additional comments, and to Peerepa Joann Moolsintong for research assistance.

1. Much of this scholarship has been written by my colleagues at George Washington. See, e.g., Orin Kerr, *The Fourth Amendment in Cyberspace: Can Encryption Create "A Reasonable Expectation of Privacy?"*, 33 Conn. L. Rev. 503 (2001); Jeffrey Rosen, *The Unwanted Gaze: The Destruction of Privacy in America* (Random House 2000); Daniel J. Solove, *Conceptualizing Privacy*, 90 Cal. L. Rev. 1087 (2002); Sonia M. Suter, *Disentangling Privacy from Property: Toward a Deeper Understanding of Genetic Privacy*, 72 Geo. Wash. L. Rev. 737 (2004).

2. For example, pursuant to the Graham-Leach-Bliley Act of 1999, banking institutions, securities firms, and insurance companies must provide notices regarding their privacy policies and permit customers to opt out of the policies. See 15 U.S.C. § 6801 (1998). These notices are routinely discarded and seem to serve little purpose other than to convey an impression that privacy is being protected. See, e.g., John Schwartz, *Privacy Policy Notices Are Called Too Common and Too Confusing*, N.Y. Times, May 7, 2001, at A1.

to Privacy,”³ in which they defined privacy as “the right to be left alone,”⁴ and much of contemporary privacy doctrine flows from a sparse phrase in a concurring opinion to a criminal case, in which the Supreme Court defined the scope of Fourth Amendment protections as premised on a reasonable expectation of privacy.⁵ In addition to the curious doctrinal origins and grounding in the law, there is an undeniably prurient quality to the idea of privacy which clouds the concept with ambivalence. Although we steadfastly guard our own privacy and expansively define our own private sphere, virtually all of us seek to peer into the private zones of others.

Another curious aspect of the privacy literature, as well as the recent Congressional attention, is that it frequently ignores workplace issues, certainly one of the areas of greatest concern with respect to privacy encroachments.⁶ Part of this lack of attention is attributable to ignorance of workplace law, but privacy, like so many aspects of the workplace, has also largely been a casualty of the law’s obeisance to the employment-at-will principle. As a basic precept, it is difficult to reconcile workplace privacy with the at-will relationship. If an employee can be fired for any reason or no reason at all, as the relationship is often defined, how can an employee assert a right to privacy when he or she has so few rights to begin with? Moreover, within the existing legal framework, so long as an employer provides notice of an intent to restrict an employee’s privacy, it is difficult for that employee to claim a reasonable expectation of privacy. Like so much that involves the employment-at-will rule, the typical antidote to invasions of privacy is for the employee to find another job; to exit, borrowing the typology of Albert Hirschman.⁷

As this brief discussion shows, workplace privacy issues go deeper than simply protecting some private space and I will suggest that the issues surrounding privacy are representative of the broader transformation that has occurred in the workplace over

3. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

4. *Id.*

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

6. I would be remiss if I did not note that workplace privacy has been explored by a number of important employment law scholars, several of whom are participating in this symposium. See, e.g., Matthew Finkin, *Privacy in Employment Law* (BNA 2d ed. 2003); Pauline Kim, *Privacy Rights, Public Policy, and the Employment Relationship*, 57 Ohio St. L.J. 671 (1996); William R. Corbett, *The Need for a Revitalized Common Law of the Workplace*, 69 Brook. L. Rev. 91, 101–19 (2003).

7. See Albert O. Hirschman, *Exit, Voice and Loyalty* (Harvard University Press 1970).

the last three decades—one where the individual has triumphed over the collective, where solemnity of privacy has displaced the power of speech and collective action as a paramount workplace value, and perhaps most important, one in which the employer's power over employees now goes virtually unchallenged. Not only has the power of employers expanded but the reach of the workplace has likewise been extended into what used to be considered private domains. Although many recoiled at the notion (and still do so today), at one time, the slogan “work is for working” reasonably captured the essence of the employment relationship. When one was at work, she worked, but after work was, well, after work. Today, that is no longer true as what is sometimes called the boundaryless workplace⁸ now entraps employees far from the confines of the workplace and with virtually no compensating benefits.

As a result, when we think about privacy in the workplace today, we run up against what is perhaps the preeminent question of contemporary employment policy: how much of oneself must one relinquish to become an employee? How much of oneself, one's life, does a worker turn over to the employer by agreeing to work for a wage? To get at these questions, we also have to address another, perhaps more fundamental question—what do employees deserve in the workplace? What kind of protection should they have, and how do we get there? Under the old union model, the answer to these questions was relatively straightforward: workers deserved as much privacy, as many workplace benefits, as they could get. But in a world without unions, one that we are dangerously close to approaching today where unions represent about eight percent of the private workforce,⁹ we must step back and look elsewhere for answers,

8. Professor Kathy Stone coined this phrase to indicate how the ties between employers, employees and work have changed. See, e.g., Katherine V.W. Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace* (Cambridge University Press 2004); Katherine V.W. Stone, *Employee Representation in the Boundaryless Workplace*, 77 Chi.-Kent L. Rev. 773 (2002); Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. Rev. 519 (2001).

9. Based on data collected by the Bureau of Labor Statistics, in 2005, unions represented 7.8% of the private workforce. The latest figures are available at www.bls.gov/news.release/union2.nr0.htm. Unions have a significantly higher presence among public employers, but because so many public union members do not have the right to strike and many are part of non-bargaining unions it is more difficult to assess the strength or value of unions in the public workplace.

and invariably, we are likely to arrive at different answers altogether.

Before proceeding further, I should note that this essay is part of a larger project in which I broadly reexamine the employment relationship. I intend this essay to be mostly a normative thought piece, and I am less concerned, at this juncture, about how my vision would be translated into reality. Instead, I want to focus on how we ought to conceive of privacy in the workplace in a way that best protects the legitimate interests of working-class employees. I also want to set forth this vision against the reigning principle of employment-at-will. If we are willing to do away with the employment-at-will rule, we could likely transform the workplace in a significant fashion simply by imposing a just cause requirement, or some other limitation on an employer's power. But it is far more difficult to craft workplace protections for employees against the at-will backdrop, which is what I will seek to do in this brief paper by limiting the definition of employment, rather than seeking to limit an employer's power within that space.

II. THE EVOLUTION OF THE WORKPLACE AND THE RISE OF PRIVACY INTERESTS

By now, the evolution of the workplace over the last three decades is a well-known tale.¹⁰ Rather than retell that story, I want to focus on the way in which issues surrounding workplace privacy reflect the shift from a collective workplace mentality to the individualistic approach that dominates today.

The story that is typically told emphasizes the decline of unions as well as the decline of lifetime employment—the two of which are obviously closely related, although it is also important to note that neither ever fully or accurately defined the workplace. Given the nostalgia we have for a lost era of labor dominance, it is always important to emphasize that at their peak, from the mid-1940s to 1954, unions represented slightly more than one-third of the

10. Two of the more prominent discussions are found in Peter Capelli, *The New Deal at Work: Managing the Market-Driven Workforce* (Harvard Business School Press 1999) and Katherine V.W. Stone, *supra*, note 8. See also Paul Osterman, *Securing Prosperity: The American Labor Market: How It has Changed and What to Do About It* (Princeton University Press 1999); Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. Rev. 351 (2002). For two recent and interesting explorations of the contemporary workplace see Alan Hyde, *Working in Silicon Valley: Economic and Legal Analysis of a High-Velocity Labor Market* (M. E. Sharpe 2003) and Andrew Ross, *No-Collar: The Humane Workplace and Its Hidden Costs* (Temple University Press 2003).

workforce,¹¹ and the idea of lifetime employment was a benefit largely restricted to white males. Even within that group, many workers never obtained the benefits of steady lifetime employment.

Regardless of its reality, there is little question that the idea of lifetime employment with steady upward progression captured the academic imagination, and I would also suggest that, in an important way, that idea represented the reality of the workplace. Even though unions never represented a majority of the workplace, through much of the 1970s the threat of unionization was real with union density rates hovering at or above thirty percent, and the presence and threat of unions made collective activity the most important employee workplace value.¹² By definition, collective activity was primarily public in nature, and necessarily relied on speech and other important First Amendment values, as embodied in the National Labor Relations Act. From this perspective, solitary activity or privacy was far less important to workers than organizing, and this was also true in the non-unionized workplace, where seniority rather than merit often determined promotions, pay, and other workplace benefits. Within the union model, what was important was the ability to meet, to congregate, and to organize, to share information rather than to hide it. While privacy was sometimes important to those efforts, it was at most an instrumental, rather than a core, value—solidarity rather than solitude mattered most.

In that nostalgic workplace, privacy was also of less import because there was less of an opportunity for privacy. When we think about manufacturing plants, auto assembly lines, even a workspace like IBM or Kodak where often only the managers had their own private offices, there was often literally no place to hide, no place for meaningful privacy. While workers have always sought to hide misdeeds from their employers, such as drinking, errors, or theft, no one but the most zealous of employee advocates would see employee privacy interests at stake in such behavior. No one has a right to drink on the job, and no one can hide behind

11. 1954 is most frequently cited as the apex of union power when unions represented approximately 34% (33.7%) of the nonagricultural labor force. The percentage, however, was nearly identical in 1946 (34.5%) although in absolute terms unions had more members in the mid-1950s. The numbers have declined ever since although the decline accelerated most significantly after 1974. For a historical table see Ronald G. Ehrenberg & Robert S. Smith, *Modern Labor Economics: Theory and Public Policy* Table 477 tbl. 13.2 (Addison Wesley Longman 6th ed. 1997).

12. See Osterman, *supra* note 10, at 30 (discussing spillover effect of union practices in non-union workplaces through the 1970s).

the cloak of privacy when their behavior directly interferes with their work. Rather, the primary question would be how far an employer might be able to go to uncover such behavior (for example, by searching a locker) but not whether the activity itself could be protected. At the same time, to the extent that an employee's off-work drinking or other activities did not interfere with her employment, there might be a protectable privacy interest because that behavior was none of the employer's business.

Not only was there no place to hide in many workplaces, but there was also less to hide. This was particularly true against the backdrop of lifetime employment: when employees expected to remain with their employer for the length of their career, they had fewer reasons to hide things, or even to keep them private, either from their employer or fellow employees. Trade secrets, even when present, were less of a threat in an environment of long-term employment because the greatest threat to trade secrets often comes from employees who are changing jobs.¹³ By the same measure, because employees were not typically competing against each other for jobs, there was also no particular reason to conceal secrets or opportunities from coworkers. Even in stable workforces, there would likely be competition for promotions, but much of that competition was limited and seniority-driven, which imposed additional restraints on the need for workplace privacy with respect to other employees.

In these stable workplaces where lifetime employment was at least a possibility, there was also a stronger element of trust between employers and their workers, and that trust again rendered privacy less significant.¹⁴ Employees trusted their employers to give them a fair shake, to avoid arbitrary layoffs, and at a minimum, to soften whatever blows might be forthcoming.¹⁵ Long-term relationships require trust, and for the most part, employers lived up to their obligation. In return, employers expected their employees to remain during the good times and bad,

13. In the modern workplace, this threat is represented in the doctrine of inevitable disclosure which permits employers to enjoin employees from moving to competitors out of a fear that the employee will "inevitably disclose" trade secrets. The leading case in this area is *Pepsico, Inc. v. Redmond*, 54 F.3d 1262 (7th Cir. 1995). The doctrine is controversial but there is little question that employers often view their current employees as potential threats to trade secrets. For a recent discussion see Catherine Fisk, *Knowledge Work: New Metaphors for the New Economy*, 80 Chi.-Kent L. Rev. 839, 854-56 (2005).

14. For an analysis of loyalty and trust in the modern workplace see Ken Matheny & Marion Crain, *Disloyal Workers and the "Un-American" Labor Law*, 82 N.C. L. Rev. 1705 (2004).

15. See Osterman, *supra* note 10, at 10-11 (discussing implicit contracts in old labor model).

rather than moving to any better opportunity that might come along, as frequently occurs in the contemporary labor market.

Although it may be less apparent, this sense of loyalty and duty was present even in a unionized workplace where both parties—while adversarial—were, at a minimum, expected to play by the rules, and again, for the most part, both sides abided by those rules. There were certainly strikes, and there have always been aberrant or rogue employers (and employees) but even in a world where the lines were drawn in an adversarial way, trust formed an important aspect of the workplace relationship.¹⁶

Once this workplace was dismantled, as it largely has been today, privacy became of greater importance to employees and, on the flipside, a greater threat to employers. Suspicion displaced trust or allegiance as the defining characteristic of the employment relationship. Added to the mix, technology unquestionably changed the nature of the workplace for many. In the past, a closed door, or a locked locker, might have offered some degree of privacy, but most employees would not have claimed a right to keep their employer out of their office, though perhaps out of their desk. But when e-mail replaced the telephone (or fax) as a common means of communication, it became easier for employees to feel a sense of privacy. While the substance of phone conversations might be presumptively private, there were almost always records of the telephone calls and employers have long been afforded the right to listen in on conversations to determine whether the call relates to business matters.¹⁷ So whatever privacy claim there might have been was limited and dependent on the employer's policy permitting the use of the telephone.

E-mail and the Internet initially felt different, as it was at least originally thought that there were fewer records, and while it is easy to tell when someone is on the telephone, it is not so easy to determine when an employee might be using e-mail or the Internet. Of course, we are now conditioned to realize that e-mail communications and Internet usage do leave records,¹⁸ but many

16. See Richard Sennett, *The Culture of the New Capitalism* 63–67 (Yale University Press 2006) (discussing decline of trust in modern workplace). There is an analogy here to litigation, which has always been adversarial by nature but is today far more so and far less trusting as too many lawyers seek to get an edge any way they can.

17. See, e.g., *Watkins v. L.M. Berry & Co.*, 704 F.2d 577 (11th Cir. 1983) (noting that employers have the right to listen in to telephone calls).

18. When I first started teaching employment law some ten years ago, my informal classroom polls routinely indicated about two-thirds of the class considered workplace e-mail to be private. Last year, not a single student suggested as much.

employees, and professors, still cling to the notion that there is something more private about these communications and that they ought to be treated as private even if they technically are not.

Technological advances have also enabled employers to act on their suspicions by providing them with more far-reaching means to snoop on their employees. Up until the middle of the 1980s, employers were relegated to monitoring their employees through physical means, either by direct observation or in some workplaces by videotape. But today the means of observation have increased exponentially, and one of the more important aspects of these new developments, and one that renders them distinct from physical monitoring, is that employees today are often unaware of their employer's spying. Cameras can be hidden just about anywhere, technology can monitor keystrokes, and movements throughout the workplace, and tracking devices can be implanted without easy detection.

Thus, privacy appears to have replaced speech as a matter of primary workplace concern. However, whereas the National Labor Relations Act protects speech integral to collective action, there is little statutory workplace protection for employee privacy interests. Other than the curious Polygraph Protection Act of 1988, which might be seen as affording some privacy by generally banning the use of polygraphs, there are few federal statutory protections, though there are a substantial number of state statutes.¹⁹ Assuming that unions will not be present to provide protections via collective bargaining agreements, the underlying policy question is what kind of protection do workers deserve?

III. DEFINING THE PROPER SCOPE OF EMPLOYEE PRIVACY

As noted at the outset, employee privacy forms an uncomfortable fit within the employment-at-will rule, which largely treats the workplace as the employer's property, affording employees few if any rights that might conflict with that property interest. Even if we do not see the workplace as the exclusive domain of employers, there is little question that employers have legitimate interests that often conflict with employees' desires for

19. See Polygraph Protection Act, 29 U.S.C. §§ 2001–2009 (1999). The other obvious relevant statute, the Electronic Communications Privacy Act (ECPA), often proves ephemeral in its protections because employers are generally afforded the right to capture employee e-mails in the ordinary course of business. See 18 U.S.C. § 2510 (2000); *Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107 (3rd Cir. 2004) (retrieval of stored e-mail messages did not violate ECPA). More to the point for my purposes, ECPA was passed in 1986 before the widespread advent of electronic communications in the workplace.

workplace privacy. Concerns about trade secrets, possible harassment suits, employee theft, efficiency in the workplace, unauthorized use of property, and so on, all justify keeping a watch on employees in a way that might infringe upon their privacy interests. To the extent we equate privacy with an ability, or a desire, to hide things, employers are rightfully suspicious of broad declarations of privacy rights for their employees.

For that reason, it is generally difficult to define a legitimate expectation of privacy in work actions. By work actions, I mean the conduct of work, or the time one spends at work, separate and apart from invasions of employee bodies themselves. When employees are at work, it is simply difficult to identify any proper basis for a privacy interest that an employee could legitimately claim, or one that might trump an employer's interest. Even the name of the basic tort protection for privacy, intrusion upon seclusion, has little meaning in the workplace where employees have little to no opportunity for seclusion.²⁰ This is not a matter of consent, as the law sometimes treats it, but rather a realization that the employee has been hired to work, and has no right to send private e-mails, view pornography, shop, blog, instant message, or talk on the telephone. Employers may tolerate many of these activities, and good management practices would counsel broad tolerance, but tolerance is surely different from establishing a legitimate expectation of privacy. Indeed, I would suggest that the only way we can see legitimate employee privacy interests in these activities is because we have come to expect too much of the workplace, thinking of the workplace as an extension of our home where we interchange work and personal activities.

Where, I think, an interest may lie, though not necessarily in the form of privacy, is through an implied contract when the employer either tolerates or permits certain actions. It seems manifestly unfair for an employer to confer privacy rights through policies, written or implied, and then to turn around and ignore those policies when it is advantageous to do so. This has always seemed the most troublesome part of the well-known *Smyth v. Pillsbury*²¹ case, in which an employee was fired for sending a rather inappropriate e-mail despite the employer's explicit policy stating that the company would not review e-mail. This is also the

20. Intrusion upon seclusion is one of the four basic privacy torts, and the one that is most commonly asserted for workplace violations. Intrusion upon seclusion requires that the defendant (a) intentionally intruded, physically or otherwise; (b) on the solitude or seclusion of another or on his private affairs or concerns; (c) in a manner highly offensive to a reasonable person. Restatement (Second) of Torts § 652B (1977).

21. 914 F. Supp. 97 (E.D. Pa. 1996).

most important aspect of the *Rulon-Miller*²² case where the court enforced the company's written policy as an implied contract right. Courts are well situated to enforce employer policies under contractual principles, at least until those policies are changed, and to do so as a matter of basic fairness.²³

Within this broad principle of the lack of privacy rights at work, I would include the recent implementation of global positioning devices in vehicles and occasionally on individuals. These devices provide locational information of employees, and many employers have installed them on all of their vehicles, and hospitals have also implanted GPS-like devices in the badges of nurses to determine who can be best deployed to the next assignment.²⁴ The introduction of these devices has often proved controversial with many claiming that they infringe on employee privacy interests while demonstrating a lack of respect for employees.²⁵

Yet, within the framework of the work-is-for-working paradigm, individuals would have a difficult time establishing a violation of a legitimate privacy interest. An employer surely has a right to know where its employees are, and what they are doing. If

22. See *Rulon-Miller v. Int'l Bus. Mach. Corp.*, 208 Cal. Rptr. 524 (Cal. Ct. App. 1984) (upholding jury verdict for employee fired for a dating relationship on the grounds that the discharge violated the employer's express policy that outside activities were a matter of privacy unless they interfered with workplace performance).

23. Because most employment policies are imposed unilaterally by employers without any negotiation with employees, courts generally allow employers to change those policies without providing additional consideration, as would typically be required in many other contract settings. For various approaches to policy modifications see *Asmus v. Pac. Bell*, 96 Cal. Repr. 2d 179 (2000) (permitting employers to alter policies so long as notice is provided, the policy was in place for some reasonable period of time, and no affected rights have vested); *Govier v. North Sound Bank*, 957 P.2d 811 (Wash. Ct. App. 1998) (new policy effective upon notice); *Demasse v. ITT Corp.*, 984 P.2d 1138 (Ariz. 1999) (requiring assent and consideration for effective modification).

24. These devices have been much in the news lately, in part because their prices have declined to make them economically efficient to install on a wider basis. For recent discussions see Matthew W. Finkin, *Information Technology & Workers' Privacy: The United States Law*, 23 Comp. Lab. L. & Pol'y J. 471, 490 (2002); Stacy A. Teicher, *It's 2 a.m. Do you Know Where Your Workers Are?* Christian Sci. Monitor, Dec. 22, 2003, at 14.

25. The use of GPS devices in the workplace gained prominence after Boston sought to install GPS devices on all of its snow plows and the snow plow drivers responded by threatening to refuse to work. The issue was ultimately resolved, and GPS devices are becoming increasingly common, particularly on vehicles. See Anthony Flint, *Plow Operators, State Agree on Deal on Satellite Phones*, Boston Globe, Dec. 6, 2003, at B6.

an employer were to stop by one's office, or call on the telephone to inquire about an employee's whereabouts, no one would imagine it proper to respond, "I am sorry but that is a matter of privacy." The same would certainly be true if the employer called a driver to ask where she was, or sought to follow the driver in a car. While the GPS devices may seem more intrusive, functionally they are little more than a substitute for visual monitoring. Obviously, the fact that the devices are more effective, and efficient, than visual monitoring cannot by itself give rise to a legitimate privacy interest. A problem may arise if the employer permits the use of a company vehicle equipped with a GPS device for personal use, in which case there ought to be a means of disabling the device when work activity has ended.²⁶ But as I discuss below, a far better approach would be for employees not to use their employers' cars for personal use, and not to accept that benefit in lieu of monetary compensation.

I do not mean to suggest that employers should be free to do what they please with their employees during working hours. If it were up to me, I would draw the line at physical intrusions of an individual's body without at least some substantial employer justification. What I do mean to suggest, however, is that there is more at stake in defining workplace privacy than trying to provide a space for employees to engage in activities otherwise forbidden by their employers. Privacy as a concept involves fundamental issues of human dignity, autonomy, and the right of individuals to have some control over their public persona. Even outside the workplace, this is a difficult concept to define, but without a modicum of privacy we would hardly be who we are.

Yet, within the workplace, the idea of tying privacy to an element of human dignity once again runs smack up against the at-will doctrine, which so often ignores issues of dignity. Workplace dignity is primarily about respect, and while providing a space for privacy may reflect respect, it is not the essence of what we consider dignity within the employment relationship. Indeed, it is not at all clear that privacy is the crucial "dignity" value—if we were concerned about employee dignity, we ought to begin by requiring employers to pay a living wage. Compared to wages and even working conditions, consider the recent mining disasters in

26. Many of these devices can be readily disabled. See Cindy Water, *Navigating Privacy Concerns to Equip Workers With GPS*, Workforce Mgt., Aug. 1, 2005, at 71 (noting that many devices can be clicked off with a switch).

West Virginia,²⁷ privacy is at most a secondary or even a tertiary workplace value. All of us would undoubtedly like more privacy, and ideally be able to define the scope of our privacy, but in the end, it is not what work is about necessarily, particularly for the working class who traditionally have been afforded far less privacy than more elite employees and typically value it less. As Michele Lamont notes in her recent exploration of working-class men in the United States and France, “[B]lue-collar workers put family above work, and find greater satisfaction in family than do upper middle class men.”²⁸ As a result, most working-class employees would likely place higher wages and employment security well above privacy as an important workplace value.

One of the problems we have in defining the proper space for workplace privacy is that it is no longer clear what work is about, what the boundaries of work are, or even what it means to be an employee. This is where I think we might make the most headway in defining workplace privacy, and that is by defining the workplace more narrowly, and an employer’s interests more specifically. When it comes to issues of privacy, the absence of workplace boundaries becomes deeply problematic and provides the strongest basis for imposing limits on an employer’s right to peer into the private lives of its workers. It is one thing to give an employer broad dominion over its own workplace but quite another to extend that dominion wherever the employee goes.

For example, just because an employee works from home should not give an employer the right to look into that home, or into an individual’s private life. One of the central values to privacy is the right to determine how much of one’s self one wants to reveal to the world, and while the desire to control one’s public persona is not always faithfully executed or observed, it is central to our vision of individual autonomy. We simply would not be the people we are if our entire lives were open to public view. The employment relationship should be no different. To the extent that an employer requires its employees to work from home beyond a normal workweek, the employer ought to relinquish any right to control the way in which that work is done, or at least relinquish the right to invade one’s privacy. After all, there is a simple antidote to the extra work: hire additional employees or require

27. See James Dao & Felicity Barringer, *Disaster at the Mine: Miners Went By the Book, But Time Ran Out*, N.Y. Times, Jan. 7, 2006, at A1 (discussing death of 12 miners in West Virginia explosion).

28. Michele Lamont, *The Dignity of Working Men: Morality and the Boundaries of Race, Class and Imagination* 30 (Harvard University Press 2000). She later adds that for working-class men, “Ensuring the protection of their families and providing for their security are their foremost concerns.” *Id.* at 52.

less work. It should not be permissible for employers to require more work and thereby also gain a foothold into one's private life.

This restriction should hold even if the employer provides a company computer for use outside of the workplace. Often, when employers provide computers, or phones, or other gadgets for employee use outside of the workplace, it is thought that the employer is being generous. But as any lawyer who is entitled to a free meal after a certain hour at night knows, these "gifts" come with many strings attached. Employers are rarely gratuitously generous. In the employment context, one string that should not attach is a waiver of privacy. Employees working at home, at the employer's request, should retain the traditional zone of privacy that governs the home, and I would suggest this is where we ought to erect a strong privacy barrier. Simply because the employer provides a computer to the employee does not mean that the workplace now extends to wherever that computer goes.²⁹

This is the kind of balance I believe the law ought to strike when confronting the question I posed at the outset, namely what do employees deserve, and how much of themselves do they give up by becoming employees? Employees deserve a realm of privacy outside of the workplace, one that the employer should generally not be able to penetrate even if the employer has legitimate interests. Obviously, the employer's interests in intellectual property, theft, harassment, and the like, remain vibrant when work is performed outside of the traditional workplace. By the same measure, employers have many alternatives to protect those interests other than invading the legitimate privacy interests of their workers. While the employer rightfully controls its own property, so too must an employee control her own property. One way to accomplish this goal would be to prohibit employers from providing equipment that might be used both for personal and professional work, and instead, require employers to give the equipment as a gift that thereafter becomes the property of the employee.

29. As an aside, to the extent the employer considers an employee's home an extension of the workplace simply because a computer has been provided, then the employer ought to also be responsible for complying with all applicable laws, including health and safety laws. When the Department of Labor issued an advisory letter during the Clinton Administration indicating that employers could be held liable for unsafe working conditions in home offices, the employer communities' outrage quickly forced a departmental retreat. See Dawn R. Swink, *Telecommuter Law: A New Frontier in Legal Liability*, 38 Am. Bus. L.J. 857, 864-71 (2001) (describing the incident). This is an indication of how imbalanced the law has become when employers are able to successfully oppose the application of some laws while seeking to enforce others.

It seems a slightly more difficult question regarding what authority an employer ought to have when an employee chooses, for her primary benefit, to work at home. By primary benefit, I mean not as a way to complete excessive work, or to accommodate an employer's lack of space, but rather as a preferred workspace that presumably enables the employee to obtain benefits that go beyond the job. In this setting, the employer has a far stronger interest in protecting its business, and the employee has a far weaker claim to privacy. At the same time, such an arrangement should not afford a license for employers to invade the employee's home as it chooses.³⁰ Rather, this seems a particularly ripe area for negotiated agreements, and ideally, the parties would negotiate the appropriate parameters of the work/nonwork divide. The employer, for example, may prohibit the use of its equipment for anything other than official business, and under those circumstances, the employee should have no cognizable privacy interest in the contents of that equipment, and in fact, should need none. Assuming the employee is choosing to work at home, to the extent she wants to protect the privacy of her home, she can choose to work in the office. She can also buy her own computer, cell phone, or other equipment, and protect her privacy by keeping the personal and the professional separate.³¹ While it may be more convenient, and less expensive to use an employer's computer for one's own private affairs, the price of that convenience may be a waiver of privacy. Just as the employer should not be able to compel work at home and treat the home as the office, an employee should not be able to choose to work at home but then consider that work private.

Ultimately, focusing on alternatives and the legitimate interests of the parties, is part of the balance the law *should* draw, which is quite different from the way in which the law today typically

30. For a recent discussion of some of the many issues that arise in what is sometimes dubbed "the virtual workplace" see Michelle A. Travis, *Equality in the Virtual Workplace*, 24 Berkeley J. Emp. & Lab. L. 283 (2003).

31. Although there have not been many cases to date involving the use of employer-provided computers in the home, this is generally the approach courts have adopted. As the court explained in one such case: "To state the obvious, no one compelled Ziemiński [the employee] or his wife or children to use the home computer for personal matters, and no one prevented him from purchasing his own computer for his personal use." *TBG Ins. Servs. v. Superior Court*, 96 Cal. App. 4th 443 (2002) (permitting discovery of employer-provided home computer pursuant to written agreement between the parties). In another high profile case, the dean of the Harvard Divinity School was removed from his position when pornography was found on his employer-provided computer. See Rosen, *supra* note 1, at 159 (discussing the case).

defers to employer interests, no matter how weak.³² Within the workplace, employer interests should typically prevail, but outside of the workplace, they ought to fail absent some compelling, and documented, interest.

This leads to two additional areas of concern: employee off-work activity and the issue of employment screening or providing employers with access to medical information. I will take up the second issue first, because within my framework, it is a relatively easy concern to address.

Social norms often define core privacy issues, and with respect to employee concerns, it would seem that the bathroom and medical information have obtained core status as matters of protectable privacy interests.³³ Medical information can provide the most intimate of details, and is perhaps the most common information we shield from others, and for many reasons. Some of those reasons have to do with feared discrimination, some with embarrassment but others simply have to do with a desire not to allow the medical information to define our public identities. As a society, we recognize this interest, and I think one reason we find greater protection for medical information is because it is an issue that affects all of us, legislators, employers and employees alike.³⁴

Current federal legislation, including the Americans With Disabilities Act, protects the confidentiality of much medical information,³⁵ but many employers still display a keen interest in medical information as it relates to their health insurance costs. For example, to the extent employers have shown an interest in genetic screening, which remains prohibitively expensive for most employers, it typically has to do with controlling health insurance costs.³⁶ Conceptually, the easiest way to neutralize the employer's

32. See discussion of off-work activity, *infra*, where employers typically do not even have to assert any legitimate interest.

33. See Lawrence O. Gostin, *Health Information Privacy*, 80 Cornell L. Rev. 451 (1995) (discussing the importance individuals place in the confidentiality of medical information).

34. This was made apparent to me at a conference I spoke at recently for state court judges. When the management attorney argued in favor of providing employers with broad dominion over employer-provided equipment, some of the judges nearly leaped out of their chairs at the idea that their employers, or any employer, could snoop around the computer at will and see private financial and medical information.

35. The ADA limits information employers can obtain from their employees and applicants, and requires that whatever information is permissibly collected be treated as confidential. See 29 C.F.R. § 1630.14 (2005) (EEOC regulation relating to health information).

36. For a discussion of genetic screening and the various issues it raises see Pauline T. Kim, *Genetic Discrimination, Genetic Privacy: Rethinking Employee*

interest is to remove health insurance from the employment relationship altogether, which would severely restrict their need for specific health or genetic information. Obviously, this is an issue that goes well beyond concerns of privacy, but at the same time it demonstrates how we can better preserve employee privacy interests by effectively downsizing the employment relationship and by reducing our expectations of work.

Whenever the prospect of stripping health insurance from the employment relationship arises, there is an immediate concern that employees would be left worse off because they would be left without any insurance at all.³⁷ This need not be the case, and there is very little rationale for having employers provide health insurance other than that large employers provide a desirably heterogeneous risk pool for insurers. But such a pool can be created in other ways such as through community ratings, or even alumni pools. More to the point, taking health insurance out of the employment relationship would release an important current restraint on employee mobility and power. Even though the Health Insurance Portability and Accountability Act³⁸ facilitates continued medical coverage, many employees remain fearful of losing their health insurance if they change or lose their job.³⁹

Protections for a Brave New Workplace, 96 Nw. U. L. Rev. 1497 (2002). As Professor Kim notes, genetic testing remains relatively rare in the workplace: “[L]ittle systemic evidence exists that such testing is a common practice.” *Id.* at 1511. To the extent employers are interested in using genetic testing, health care costs seem to be an important motivating factor. *Id.* at 1540. A substantial literature has developed around genetic screening. See, e.g., Paul Steven Miller, *Is There a Pink Slip in My Genes? Genetic Discrimination in the Workplace*, 3 J. Health Care L. & Pol’y 225 (2000); Melinda B. Kaufman, *Genetic Discrimination in the Workplace: An Overview of Existing Protections*, 30 Loy. U. Chi. L.J. 393 (1999).

37. Without going into too much detail, let me offer some reasons why employees do not fare well under the current system. First, employees typically have very limited choices among health plans, and there is little reason to believe employers are the best agent for the interests of employees in choosing a health plan. Second, the costs of health insurance are easily exaggerated, in large part because it is virtually impossible for employees to determine the actual costs of the insurance, and many employees are forced to trade income even when they do not opt for an employer’s insurance. Typically married couples share a health policy, but employers never offer to provide the cash equivalent to employees who decline health insurance coverage, even though benefits are typically a substitute for cash income. Although this is true of many unused benefits, health insurance now forms the largest portion of employee benefits and thus, the most significant forfeited benefit among employees.

38. 42 U.S.C. § 1302d (2003).

39. The Health Insurance Portability and Accountability Act (HIPAA) makes it easier for employees to obtain health insurance when they change jobs

Even if employers were stripped of the responsibility for providing health insurance, they might still claim an interest in their employee's medical conditions in order to determine their potential reliability. This is the sort of interest, however, that ought to prove wholly inadequate to justify collecting private medical information. Employees miss work for all kinds of reasons, and an employee's past employment history ought to provide adequate information regarding likely attendance so as to defeat whatever marginal gain additional information might provide. If we are to create a greater zone of privacy for employees, we must re-think the employment-at-will relationship to the extent that it provides such broad authority for employers to control or dictate the lives of their employees outside of the workplace, particularly when not immediately relevant to their work duties. When the employer's reach extends beyond the boundaries of the workplace, the notion so critical to employment law that the employee can always get another job should be insufficient to justify personal intrusions.

Another way to obtain a reasonable balance between the interests of employers and employees with respect to medical screening would be to require employers to implement screening across-the-board, to top executives as well as those at the bottom. My sense is that many employers would shy away from genetic testing or other health screenings if they were also subject to the tests.

Today, drug testing is the most prevalent form of health screening and I will confess that I am a bit indifferent to the subject. In certain occupations, and among certain employers, drug testing is so well-entrenched that it seems a bit late to mount privacy challenges, though successful challenges do occasionally arise.⁴⁰ As the war on drugs has faded, there also seems to be less of an employer interest in drug testing than there was during the 1980s, when much of the testing commenced, and so it seems that

by restricting the force of pre-existing condition clauses, and through some other means. See 42 U.S.C. § 1320d (2003). Despite this law, a Henry J. Kaiser Foundation survey found that 24% of the surveyed population indicated they were staying in their job for fear of losing health insurance if they were to change jobs. See Victoria Colliver, *Stuck on the Job: Fear of Losing Insurance Keeps Workers from Moving On*, S.F. Chron., June 12, 2003, at B-1 (discussing the survey).

40. The issue of drug testing is thoroughly explored in Professor Pauline Kim's contribution to this symposium. See Pauline T. Kim, *Collective and Individual Approaches to Protecting Employee Privacy: The Experience with Workplace Drug Testing*, 66 La. L. Rev. __ (2006).

we may have arrived at a reasonably stable equilibrium on the issue. At the same time, drug testing pries into off-work activity without any necessary proof that drug use is either suspected or interferes with on-work activity, and from that perspective drug testing is another manifestation of the many ways in which employers influence the lives of employees outside of the workplace.

This leads me to the area that is most troubling in terms of the expansion of work into private spheres, and that is an employer's ability to control off-work activities. Several recent articles have canvassed this area and Professor Finkin's symposium contribution likewise explores the topic,⁴¹ and I will confine my comments to working within the framework I have earlier established of limiting the employer's power to the workplace. I should also note that many off-work activities do not implicate privacy interests insofar as many of the activities are, in fact, public. In another sense, these issues do touch on privacy to the extent we seek a demarcation in what occurs in our private lives from our work lives, and I think it is in that sense that off-work activity is thought to infringe on issues of employee privacy.

A number of states have sought to protect off-work activities legislatively, often at the behest of the tobacco lobby which has sought to protect off-work smoking.⁴² These statutes are often limited in scope, and without specific legislative protection, the public policy tort provides the best means of protecting encroachments on off-work activity.⁴³ However, as currently applied, the public policy tort typically provides only limited protection, and indeed, offers such limited utility that what ought to be difficult decisions are frequently decided summarily with little analysis and without requiring any justification on the employer's part.⁴⁴ The public policy tort should be extended to

41. See Matthew W. Finkin, *Life Away From Work*, 66 La. L. Rev. ___ (2006); Marisa Anne Pagnattaro, *What Do You Do When You are Not at Work? Limiting the Use of Off-Duty Conduct as the Basis for Adverse Employment Decisions*, 6 U. Pa. J. Lab. & Emp. L. 625 (2004); Stephen D. Sugarman, "Lifestyle" Discrimination in Employment, 24 Berkeley J. Emp. & Lab. L. 377 (2003).

42. The statutes are chronicled in Finkin, *supra* note 6, 691–716.

43. What is known as "the public policy tort" provides a cause of action for wrongful discharge when an employee's termination violates established public policy. Most states have adopted some form of the tort, but its scope can vary substantially by jurisdiction. See Marion G. Crain, Pauline T. Kim & Michael Selmi, *Work Law: Cases and Materials* 177–212 (Lexis Law Publishing 2005).

44. See, e.g., *Edmonson v. Shearer Lumber Prods.*, 75 P.3d 733 (Idaho 2003) (upholding termination of employee who spoke out against a project supported by his employer); *Jutey v. John Muir Med. Ctr.*, 97 Cal. App. 4th 814

include all off-work activity, and require the employer to substantiate a legitimate business interest that outweighs the employee's interests in order to uphold a termination for off-work activity. Such an extension would effectively require employers to articulate, and prove, their legitimate interests, similar to the current law with respect to the speech of public employees. When an employee is terminated because of speech that touches on a matter of public concern, courts conduct a balancing test that weighs the competing interests.⁴⁵ The test developed in the speech context can be quite deferential to employers, and if the speech is not a matter of public concern, the employee is afforded no protection at all and the employer need not offer any justification for its action. As a result, I would propose that any time an employer terminates an employee for lawful off-work activity, the employer must provide a compelling justification for its action sufficient to override the employee's substantial interest in off-work autonomy.⁴⁶

Even under this test, employers could often prevail. For example, if an employee's off-work conduct could be clearly attributed to the employer, the employer would likely have a legitimate interest in protecting its reputation by terminating employees who are engaged in particular activities that might bring public opprobrium. Abhorrent public behavior, such as those of a

(Cal. Ct. App. 2002) (permitting employer to terminate an employee for suing a client of the employer); *McCavitt v. Swiss Reinsurance America Co.*, 237 F.3d 166 (2d Cir. 2001) (holding that romantic relationship is not a protected activity under New York statute that protects recreational activities); *Marsh v. Delta Air Lines, Inc.*, 952 F. Supp. 1458 (D. Colo. 1997) (upholding termination of employee who wrote a letter to the editor that was contrary to employer's interest); *Brunner v. Al Attar*, 786 S.W.2d 784 (Tex. App. 1990) (upholding termination of employee because he volunteered at AIDS foundation).

45. The test was developed in a series of Supreme Court cases including *Pickering v. Bd. of Educ.*, 391 U.S. 563, 88 S. Ct. 1731 (1968); *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684 (1983); *Rankin v. McPherson*, 483 U.S. 378, 107 S. Ct. 2891 (1987).

46. An example of the kind of analysis a court would conduct is found in *Pereira v. Comm'r of Social Serv.*, 733 N.E. 2d 112 (Mass. 2000). The case involved an investigator for the Department of Social Services who made a racist joke at a private banquet for a retiring public official, and her remark was later reported in newspapers. Although the Supreme Judicial Court of Massachusetts determined the speech was not a matter of public concern, because it occurred away from work and was not directly related to work, the court applied the balancing test applicable to speech of public concern. *Id.* at 120. The court ultimately determined that the Department was justified in terminating the investigator, in large part because the subsequent publicity of the remark threatened the image and credibility of the agency.

white supremacist, might fit this scenario, but only with respect to those employees who might be readily identified with the employer. This is likely to be executives rather than rank and file employees, and as a general matter, I would exclude highly compensated individuals from any common law public policy protections (other than whistle blowing, but that is now typically handled by statute) as they have the power to negotiate agreements, and also typically have the greatest labor market mobility. Outside of executive employees, it would be very difficult for an employer to establish the necessary link between private employee behavior and the employer's reputation. However, if an employee were to use the employer's identity for some off-work activity, then the employer ought to be able to terminate that employee for the conduct, since the employee is now mixing on- and off-work activity in a way that might be harmful to the employer's interest, and for which the employee has no particular claim of right. The recent case involving a San Diego police officer who sold pornographic videos that featured him in a uniform seems an unusually easy case.⁴⁷ Similarly, the Delta flight attendant who appeared in her uniform on her blog, in a suggestive but non-pornographic way, should have no protection for her subsequent discharge since it was quite possible that the employee, and her blog, would be identified with her airline.⁴⁸ Just as important, she has no claim to a right to appear in her uniform outside of the workplace.⁴⁹

How to balance off-work activity with the interests of other employees is a more delicate matter, and one that does not lend itself to easy categorization. It may be that our best option is to

47. See *City of San Diego v. Roe*, 543 U.S. 77, 125 S. Ct. 521 (2004) (per curiam). Although the officer did not appear in his San Diego Police Department (SDPD) uniform, he was identified as a law enforcement officer and elsewhere on eBay did sell SDPD uniforms. As the Court noted, "Although Roe's activities took place outside the workplace and purported to be about objects not related to his employment, the SDPD demonstrated legitimate and substantial interests of its own were compromised by his speech." *Id.* at 81, 125 S. Ct. 524.

48. See Christine Negroni, *Fired Flight Attendant Finds Blogs Can Backfire*, N.Y. Times, Nov. 16, 2004, at C9 (noting that she had posed provocatively in her uniform).

⁴⁹ The flight attendant subsequently filed a sex discrimination lawsuit against Delta in which she alleged that male flight attendants were allowed to appear in uniform on blogs without discipline. See Mike Tierney, *Ex-Flight Attendant Sues Delta Over Blog*, Atlanta Journal-Constitution, Sep. 8, 2005, at 1E. The fact that she ended up filing a discrimination, rather than a privacy case, suggests that despite all the publicity she received, there was likely no basis for pursuing a privacy claim.

allow our existing antidiscrimination laws to do the work, although that solution might be more appealing if more states prohibited discrimination based on sexual orientation, since this is an area that may pose significant workplace conflicts. But for whatever reason, conflicts among employees involving off-work conduct do not seem to arise with much frequency compared to incidents where employers act in their own apparent business interests to terminate employees because of off-work activity.

A recent issue involving sexual orientation raised some interesting privacy and balancing concerns. Last year, Bank of America asked its employees to identify their sexual orientation in an anonymous online poll.⁵⁰ According to the company, and there is no particular reason to doubt it, they were seeking the information as part of their broader diversity initiatives and had no intent to use the information other than in developing programs, and perhaps benefits, for their employees. At the same time, this inquiry seems particularly invasive, as many individuals strongly prefer to keep their sexual orientation private, in a way that is not necessarily possible with race, gender, and in many instances age or disability.

Yet, on this issue, it does not strike me that the employer did anything wrong in inquiring about the employee's sexual orientation, and I think the problem lies more in the fact that differing sexual orientations have not yet gained sufficient societal acceptance. Even if we had moved to broader social acceptance, many individuals might still want to keep their sexual preferences private, and no employer should require that information to be divulged. But to ask as a way of tailoring employment benefits to the needs and interests of the workforce seems to me something to be encouraged, and perhaps if we lived in a more trustful environment, it would be. Then again, if we did not expect so much from our employment, if we did not expect health insurance, life insurance, and so on, there would be no basis for such an inquiry.

At the *Louisiana Law Review* symposium where this paper was originally presented, Professor Matthew Finkin forcefully challenged the notion that it was necessary to trade privacy within the workplace for a barrier outside of the workplace.⁵¹ He contended that such a sharp dichotomy was unnecessary, and while I am sympathetic to his critique, it seems to me that this sharp distinction is most consistent with the employment-at-will rule,

50. See David Lazarus, *Bank of America Survey Asks Workers About Sexual Orientation*, S.F. Chron., Jan. 15, 2005, at C-1.

51. Finkin, *supra* note 41.

and I think it is also consistent with my concept of what employees deserve. On the one hand, allowing employers such broad dominion over the workplace may functionally turn that workplace into the equivalent of a prison, where employee rights parallel the limited rights of prisoners. Yet, this need not be the case. Most employers will not impose such draconian rules, and if they do, it ought to be a clarion call for union representation. More to the point, many lower-rung jobs will always be hugely undesirable. There is very little we can do to make the jobs at Wal-Mart pleasant, or to make Wal-Mart treat their employees with respect, short of overhauling the entire system. And if we were to focus on improving those jobs, we ought to focus on increasing pay and providing meaningful health insurance, so long as insurance continues to be employer driven.

We can, however, seek to keep Wal-Mart out of employee homes, out of city council meetings, out of their employee's private lives. We can do that without modifying the employment-at-will rule and by defining employment more specifically to include only the time an individual is actually working. Rather than focusing on workplace privacy, we would be better served by protecting lawful off-work activities and requiring a substantial justification when an employer seeks to interfere with those activities.

IV. CONCLUSION

Workplace privacy has received an inordinate amount of attention in the last few years, in part because of the growing concerns regarding the invasion of privacy outside of the workplace. Yet, within the workplace, most employees cannot claim any level of entitlement to "seclusion" or to privacy, and rather than focusing on such issues, employees would benefit by efforts designed to restrict employers' reach from extending beyond the workplace.