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What We Talk About When We Talk About Workplace Privacy

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Foreword: What We Talk About When We Talk About Workplace Privacy

Anita Bernstein *

When seven academic experts gathered in Baton Rouge to expound on the elusive concept of workplace privacy, they kindly kept a place for me at their table to attempt a summary of their insights. Consistent with the soupçon of technophobia that flavors most contemporary gatherings on the law of workplace privacy in the United States,¹ I start by encouraging readers to fight the tendency of electronic media to cut law review commentary into small pieces² and read, if they can, the entire collection of seven papers published in this issue of the *Louisiana Law Review*. With utter confidence I say that no matter how deep or shallow your knowledge of this field may be, you will find material for reflection here, both in the individual papers and the book that they combine to form.

Many possible divergent approaches in a Foreword could try to unite this bounteous collection. My own overview begins with its disarray: How can one speak of workplace privacy, given that this field has (at least so far) refused to settle on a definition of this term?³ During our weekend at the LSU campus, speakers

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* Sam Nunn Professor of Law, Emory University, and Wallace Stevens Professor of Law, New York Law School. My thanks to the editors of the *Louisiana Law Review* and Professor William Corbett for the exquisite hospitality—and careful logistics—that they brought to this Symposium, and to Michael Ausubel for skilled research assistance.

1. For example, one online fact sheet on workplace privacy published for public reference begins with an overview of monitoring technology. Workplace Privacy and Employee Monitoring, *Fact Sheet No. 7: Workplace Privacy*, Privacy Rights Clearinghouse, <http://www.privacyrights.org/fs/fs7-work.htm>. See also Frederick S. Lane III, *The Naked Employee: How Technology is Compromising Workplace Privacy* 4 (2003) (noting that “the trends that drive technology—faster, smaller, cheaper—make it possible for larger and larger numbers of employers to gather ever-greater amounts of personal data”). Our conference impresario, Bill Corbett, has written insightfully about electronic monitoring technologies at work. William R. Corbett, *The Need for a Revitalized Common Law of the Workplace*, 69 Brooklyn L. Rev. 91, 102–05 (2003).

2. My more positive take on this phenomenon appears in Anita Bernstein, *Restatement Redux*, 48 Vand. L. Rev. 1663, 1670 (1995).

3. So, for instance, contributor Finkin begins his treatise on workplace privacy by describing privacy in general. Matthew W. Finkin, *Privacy in Employment Law* xxiii (2d ed 2003) [hereinafter Finkin, *Privacy*]. Only later in the introduction does Finkin move to the workplace. *Id.* at xxix. Another contributor has come closer to writing a definition of this term. Pauline T. Kim,

occasionally lamented the lack of cohesion or unity in our subject matter. They had standing to express regret: they live in the field. For me as outsider-observer, the lack of an agreed-on definition of workplace privacy seemed of interest—revealing and informative—rather than problematic. So I sat at the table and wrote down what I heard speakers offer as partial aspects of the concept.⁴ Let me next share some of what the Symposium contributions say here, and then investigate how, perhaps, the dots connect.

I. ASPECTS OF WORKPLACE PRIVACY

In lieu of a definition, our Symposium contributors relate workplace privacy to a range of complementary concepts.

A. *The Human Aversion to Surveillance*

Participants invoke workplace privacy with reference to what employers invade or trammel on the job. Observed urination, for example, strikes two participants, Dean Steven Willborn and Professor Pauline Kim, as an invasion.⁵ Professor Michael Selmi remarks that global positioning devices used to monitor employee whereabouts “may seem intrusive,” although Selmi goes on to conclude that “functionally they are little more than a substitute for

Privacy Rights, Public Policy, and the Employment Relationship, 57 Ohio State L.J. 671, 700–01 (1996) (naming access to a person’s body and bodily functions, information about a person’s health and sexuality, a person’s home, and the communications that a person makes by telephone and the mails as areas that have “frequently been recognized as private”).

4. A cautionary word about American parochialism: Other national legal systems have come closer to expressing a sense of the concept. The comparative scholarship of Symposium contributor Finkin has been prominent in contrasting American treatments of workplace privacy with those of other nations. See *infra* Part I.E. In this Foreword, I focus on the American context that occupied our Symposium.

5. Steven L. Willborn, *Consenting Employees: Workplace Privacy and the Role of Consent*, 66 La. L. Rev. 975, 1003 n.105 (2006) (“With direct observation of urination, one might assert that should be a problem even if the employee consents.”). Kim described a case where a manager at the St. Louis supermarket chain Schnuck’s appeared to overreact to an incident where a worker cut himself on a slicing machine; citing a “policy” of after-accident protocols, this manager ordered the worker to strip naked and urinate for a drug test while being observed. Pauline Kim, Professor of Law, Washington University in St. Louis, *Comparing Collective and Individual Approaches to Protecting Employee Privacy*, Address at the Louisiana Law Review Symposium: Privacy in the Workplace (Feb. 9, 2006).

visual monitoring.”⁶ Professor Charles Craver refers to “cameras or microphones” that “spy upon the protected organizational activities of employees.”⁷

These references to surveillance rest at the edges of participants’ contributions. No author deems them central to the material he or she covers. Several of them note the evident lawfulness of surveillance at work. Putting aside exceptionally intrusive invasions—such as a surreptitiously mounted one-way glass looking into toilet stalls—along with intrusions into concerted activity, our participants agree that employees have no legally recognized privacy interest in remaining free from employer snooping. Courts regard the acceptance of employment as acceptance of the invasions that employers choose to impose.⁸ Keystrokes at computer terminals may be monitored; GPS tracking devices can beam to an employer where employees are; workers’ e-mail is not sacred. “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,” concludes Selmi.⁹

(As a spectator at the conference, I would like to have seen a little more of a fight on surveillance. One might argue, for instance, that observation via closed-circuit television camera is worse than the human-on-human snooping to which Selmi compared it—if only because a video image of a face can be re-wound and replayed, edited, and enlarged into grotesque nostril-boring expansion, whereas the human snoop gets nothing to exploit beyond his glance.¹⁰ Conference participants did not argue against

6. Michael Selmi, *Privacy for the Working Class: Public Work and Private Lives*, 66 La. L. Rev. 1035, 1045 (124) (2006).

7. Charles B. Craver, *Privacy Issues Affecting Employers, Employees, and Labor Organizations*, 66 La. L. Rev. 1057, 1068 (2006).

8. Apparently even deception by the employer does not necessarily defeat this prerogative. See, e.g., *Smyth v. Pillsbury Co.*, 914 F. Supp. 2d 97 (E.D. Pa. 1996) (holding that employer did not violate employees’ privacy by intercepting and reading e-mail and then firing an employee for making comments derogatory of management in this e-mail, even though the employer had announced that it would not intercept e-mail or use messages against employees); *Turner v. General Adjustment Bureau, Inc.*, 832 P.2d 62 (Utah App. 1992) (finding no liability for invasion of privacy when an employer pretended to be a market researcher and entered an employee’s home on this pretext, to investigate a claim of work injury). These cases, along with others, are cited and discussed in Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. Pa. J. Lab. & Emp. L. 65, 82–84 (2000).

9. Selmi, *supra* note 6, at 1043.

10. For this line of thought I am indebted to my colleague Carlin Meyer. Professor Meyer shared her thoughts on workplace privacy with me in a phone

the pro-surveillance consensus in American law. And yet most of them did take a moment to mention the topic. They noted the way people feel when they are snooped upon, without advocating law-based relief to ease this discomfort.)

B. Autonomy

References to autonomy arise frequently in this Symposium, although not every contributor favors this word. At the conference and in his article, Willborn prefers to speak of "consent." In this volume he begins with the somber sketch of privacy that Ruth Gavison pioneered a generation ago.¹¹ Gavison contrasts "perfect" privacy with the perfect *absence* of privacy using three variables—"secrecy," "anonymity," and "solitude"—that combine to express a level of accessibility. A person experiences perfect privacy when nobody has information about her (Gavison's "secrecy"), "no one pays attention to her (anonymity), and no one has physical access to her (solitude)."¹² At the other end of the accessibility continuum, a person experiences "a state of perfect lack of privacy" when all information about him is known; everything he does is known and attributed to him by his name; and he is continuously observed.¹³ Neither extreme makes for a desirable way to live. The concept of consent, Willborn argues, mediates between the two extremes, or at least it can do so away from the workplace. Willborn concedes that "consent in employment settings is difficult and compromised."¹⁴ In dealings with some people, we all want solitude, secrecy, and anonymity; in dealings with others—our intimates or people who might become our intimates—such conditions would make us feel bleak and isolated. Like the anti-surveillance version of privacy just mentioned above, Willborn's consent-based version of autonomy works with negative concepts. Privacy in this view is manifest in its barriers.

Other participants, providing a contrast, invoked autonomy with reference to overt, or positive, expressions. In the view of Professors Rafael Gely and Leonard Bierman, employee-created

conversation on February 8, 2006. See also Lane, *supra* note 1 at 119–23 (discussing prurient and voyeuristic misuses of video footage in the workplace).

11. Willborn, *supra* note 5, at 977 (citing Ruth Gavison, *Privacy and the Limits of Law*, 89 Yale L.J. 421 (1980)).

12. *Id.* at 977.

13. *Id.* at 977.

14. *Id.* at 1008.

blogs fit within the subject matter of this conference, even though one might think of a blog as the opposite of privacy: Gely and Bierman note that reading a blog once felt like "reading someone else's diary over their shoulder."¹⁵ Around the time of the 9/11 terrorist attacks and the beginning of war in Iraq, however, the blog took on a different identity. Gely and Bierman note the distinctive features of blogs: a reverse-chronological presentation of content, the use of links, interactive capacity, and low entry costs.¹⁶ These characteristics combine to bring the blogger into the reader's life in a relationship that is much more dynamic and fluid than the relation between, for example, newspaper editorial writer and reader. From there, Gely and Bierman suggest, it is a short step indeed for a blogger to feel she needs this medium: the blog comes to be integral to who she is and how she communicates with other people. To shut it down would feel like an amputation.¹⁷ Not surprisingly, as Gely and Bierman show, the expression within employee blogs has gotten workers in trouble with their employers,¹⁸ while employers for their part have adopted the medium to present themselves in a flattering light:¹⁹ the blog as artifice and P.R. For increasing numbers of employees and employers, the blog embodies and expresses a version of their personality that they adopt and reshape in response to feedback from their readers.

15. Rafael Gely & Leonard Bierman, *Workplace Blogs and Workers' Privacy*, 66 La. L. Rev. 1079 (67) (2006) (quoting Andrew Sullivan, *A Blogger Manifesto: Why Online Weblogs Are One Future for Journalism*, February 24, 2002, <http://www.andrewsullivan.com/mainarticle.php?artnum20020224>).

16. *Id.* at 1082.

17. Not always: some people start to blog and then quit. At the spoken version of this Symposium, Gely described himself as "a recovering blogger"; his experiment with the medium ran for about a year before he concluded that it was "not [his] cup of tea." Rafael Gely, Professor of Law, University of Cincinnati College of Law, *Workplace Blogs and Workers' Privacy*, Address at the Louisiana Law Review Symposium: Privacy in the Workplace (Feb. 9, 2006). At the same event, we participants observed Paul M. Secunda of the University of Mississippi School of Law brewing quite a cup of tea: using a laptop and the room's wireless connection, Professor Secunda generated lively and visually elegant content for his blog, in real time. See http://lawprofessors.typepad.com/laborprof_blog (last visited Mar. 20, 2006).

18. Gely & Bierman, *supra* note 15.

19. *Id.*; see also Michael Barbaro, *Wal-Mart Enlists Bloggers in P.R. Campaign*, N.Y. Times, Mar. 7, 2006, available at 2006 WNLN 3798247 ("Under assault as never before, Wal-Mart is increasingly looking beyond the mainstream media and working directly with bloggers, feeding them exclusive nuggets of news, suggesting topics for postings and even inviting them to visit its corporate headquarters.").

Professor Catherine Fisk explores another positive variation on the theme of workplace privacy as autonomy, or what she calls “autonomy privacy”: “Clothes and appearance are constitutive of how we see and feel about ourselves and how we construct ourselves for the rest of the world,”²⁰ she writes. Like a blog, clothes seem unrelated to privacy as understood in either anti-surveillance sentiment or the Gavison-Willborn concepts of secrecy, anonymity, and solitude.²¹ When privacy emerges as autonomy, however, it becomes possible to find violations of it in edicts to change one’s display or to stop displaying. Fisk reminds us that David Stern of the National Basketball Association decreed “that professional basketball players should dress like businessmen rather than rappers when they appear in public,” while Yankees-meister George Steinbrenner forced a haircut on star center fielder Johnny Damon. These employers were “trying to make employees project an image that the employees [did not] want to project,”²² thereby treading on autonomy. Fisk concludes that privacy theory should be “available to any employee who can convince a court that some aspect of a dress code is offensive to their authentic self.”²³

C. *Menschenbild: Persönlichkeitsrecht*

The “autonomy privacy” understanding of workplace privacy, though broader than the negative understanding that Willborn expresses, is narrower than a version of workplace privacy found in some European legal systems. These conceptions go beyond the episodes of autonomy that Gely, Bierman, and Fisk have presented—freedom to blog, freedom to groom or not groom according to a boss’s wish—by constructing a legal doctrine of personhood that recognizes enforceable rights and entitlements. In his writings on comparative workplace privacy, Professor Matthew Finkin suggests that English may lack some essential words that could shed light on this concept.

20. Catherine L. Fisk, *Privacy, Power, and Humiliation at Work: Re-Examining Appearance Regulations as an Invasion of Privacy*, 66 La. L. Rev. 1111, 1111–12 (29–30) (2006).

21. *See id.*

22. *Id.* at 1120.

23. *Id.* at 1138. Willborn, who focuses on the contractual aspects of workplace privacy, would likely find no violation of privacy in the Steinbrenner edict. If an employer wants to pay, and an employee receive, millions of dollars for a deal that includes an employer-mandated hairstyle for the employee, so be it, I believe Willborn would say.

Finkin starts with *Menschenbild*, literally the German word for “picture of Man” and figuratively a conception of the human being from which generalizations can be extracted. For example, “homo economicus” is the *Menschenbild* of neoclassical economics, while communitarianism paints a *Menschenbild* of “civil responsibility and social accountability.”²⁴ Finkin’s review of workplace privacy law in other countries’ perspective identifies a *Menschenbild* in Germany that has more commitment to what might inadequately be called in English “personality.”²⁵ The German *Persönlichkeitsrecht*, or legal category of personhood-personality, conveys some flavor of this conception.²⁶ Similarly, the law in France sees each person as possessing a counterpart to *Persönlichkeitsrecht* that she does not relinquish at the workplace threshold.²⁷

American law does not overlook or neglect the individual as a locus of rights and entitlements, but it does tend to juxtapose this rights-bearer only against the government, and so within American law the *Menschenbild* of conflict between private individuals or entities is expressed in terms of property and contract rather than personality. Finkin’s comparative studies suggest that this American choice is not inevitable: American law could compel private actors as well as government entities to honor conceptions of individuals, including workers, in their ownership of personae.²⁸ Instead, workplace privacy in the United States is relegated mostly to the employment contract, and American law concludes that workers consent to personality-infringing edicts when they accept their jobs.²⁹

24. Matthew W. Finkin, *Menschenbild: The Conception of the Employee as a Person in Western Law*, 23 Comp. Lab. L. & Pol’y J. 577, 579 n. 11 (2002) (hereinafter Finkin, *Menschenbild*).

25. Presenting his paper to the audience in Baton Rouge, Finkin remarked that “personality” is a trivial word in contemporary English: whenever a person is said to have a nice personality, or no personality, the comment is understood not to go very deep. Matthew W. Finkin, Albert J. Harno Professor, University of Illinois College of Law, Life Away From Work, Address at the Louisiana Law Review Symposium: Privacy in the Workplace (Feb. 9, 2006).

26. A well-known *Persönlichkeitsrecht*-based decision of the European Court of Human Rights accepted a claim by Caroline of Monaco that her rights to privacy and personhood were violated by the publication of photographs that depicted the famous princess—in American parlance, a public figure—and her children in their daily lives. *Von Hannover v. Germany*, 2004-VI Eur. Ct. H.R., available at <http://www.echr.coe.int> (visited May 11, 2006).

27. Matthew W. Finkin, *Life Away From Work*, 66 La. L. Rev. 945, 947.

28. See generally Finkin, *Menschenbild*, *supra* note 24.

29. Summers, *supra* note 8, at 84.

D. Secrets

The secrets perspective on workplace privacy overlaps with the aversion to surveillance perspective discussed above, but focuses on the disclosure of particular data or information, obtained by non-surveillance means, that an employee would prefer not to share. While favoring a broader working definition of workplace privacy,³⁰ Charles Craver takes time to pause over secrets. His contribution to this Symposium benefits from his decades of experience in labor and employment law. For instance, when discussing the contemporary topic of unwanted genetic scrutiny as a condition of obtaining a new job, Craver recalls the years preceding the Americans with Disabilities Act when employers routinely demanded pre-hiring physical examinations, and questioned job applicants extensively about their medical histories.³¹

Medical secrets come up also in Willborn's contribution. Like Fisk, he mentions professional athletes: Trevis Smith, a Canadian Football League linebacker, consented to an employer-administered HIV test, but did not consent to the release of its result, which was positive; Eddie Curry, who was playing basketball for the Chicago Bulls when he was diagnosed with an irregular heartbeat, refused a request by the Bulls to take a DNA to rule out hypertrophic cardiomyopathy, a condition that had killed other basketball stars.³² This variation on a theme of privacy returns us to the Gavison fundamentals, which begin with "secrecy."³³

30. Craver, *supra* note 7.

31. *Id.* at 1058. One summer back in the Pleistocene era I was a college student seeking a ten-week gig as a secretary. I applied for a position at a large New York bank, where a human-resources manager told me I would have to go through a medical exam before I could be hired. Workplace drug testing not been having been invented, I couldn't imagine what these functionaries sought to uncover in an 18-year-old who had aced their typing test and needed a summer job. Maybe pregnancy? For someone who didn't savor medical probing even under warmer conditions, the prospect of being examined in a bank office—fluorescent lights, chilly air-conditioning—by a physician who looked at bodies in terms of business needs rather than patient health seemed creepy, a bit Mengele-like. See generally Finkin, Privacy, *supra* note 3, at 5–6 (summarizing the history of this practice—which is indeed somewhat sinister). I never returned for the checkup, and instead accepted a job with a real estate firm that was uninterested in taking advantage of this pre-ADA employer prerogative. I suppose employment-at-will fans would applaud my 1979 story: the bank and I both asserted and stuck to our differing wishes, free from regulatory intervention. See *infra* note 80 and accompanying text.

32. Willborn, *supra* note 5, at 987–90.

33. See Gavison, *supra* note 11.

E. Power and Powerlessness

The Symposium has led some contributors to reflect on distributions of power in the workplace. For Fisk, dress codes may be “as much about power as about discrimination,” whenever “an employer feels empowered to articulate and enforce” such codes without feeling a need to give reasons for them.³⁴ Dress codes are conventionally understood to be about something other than power, such as “screening” (the generic term for filtering undesirable goods from desirable ones in a market), “signaling” (i.e., conveying to the employer that a prospective employee is willing to live with the image the dress code suggests), or stereotyping (as in famous workplace cases like *Price Waterhouse v. Hopkins*³⁵ and *Jespersen v. Harrah’s Operating Company*³⁶). Fisk goes on to argue, however, that a “privacy analysis”³⁷ exposes the shallowness, or at least the inadequacy, of these rival explanations.³⁸ In *Hopkins*, for example, Price Waterhouse not only stereotyped the plaintiff (“dress more femininely,” “wear more makeup”), but also went out of its way to insult her.³⁹ Fisk reminds us of the upper-income norm that all rules about how to dress must be conveyed gently—by example or perhaps through peer pressure—and never in the style of “the headmistress of [the young Catherine Fisk’s] parochial school who used to feel entitled to remark on which girls wore their uniform skirts too short and who needed to polish her saddle shoes.”⁴⁰

Taking a different view of the point where workplace privacy meets workplace power and powerlessness, Michael Selmi regards privacy as a relatively trivial desire among the mix of wishes that workers might bring to their jobs. He wryly remarks that if privacy implicates dignity, then the working poor face direr threats than what is at issue here in our Symposium: “if we were concerned about employee dignity, we ought to begin by requiring employers to pay a living wage.”⁴¹ Selmi argues that because of structures that make employers more powerful than employees, the path to augmenting employee power lies in making the workplace

34. Fisk, *supra* note 20, at 1121–22.

35. *Price Waterhouse v. Hopkins*, 825 F.2d 458 (D.C. Cir. 1987), *rev’d*, 490 U.S. 228, 109 S. Ct. 1775 (1989).

36. *Jespersen v. Harrah’s Operating Co.* 392 F.3d 1076 (9th Cir. 2004), *vacated for rehearing*, 409 F.3d 1061 (2005).

37. Fisk, *supra* note 20, at 1125.

38. *Id.* at 1125.

39. *Price Waterhouse*, 825 F.2d at 463.

40. Fisk, *supra* note 20, at 1118.

41. Selmi, *supra* note 6, at 1045.

smaller; any terrain that workers share with bosses must become yet another locus of employee disempowerment.⁴² For this reason, Selmi disapproves of employer-purchased largesse like home computers and company cars.⁴³ Far from generous offerings, these Trojan horses sneak the workplace into what should be the employee's space away from employers regnant. Selmi would prohibit employers from furnishing equipment that is amenable to both personal and occupational use, thereby forcing the employer either to convey the equipment as a gift or abandon this version of technology transfer.⁴⁴ Whenever boss and worker meet on a worksite, the worker is necessarily weak, and the boss strong at the worker's expense. To narrow the power gap, says Selmi, narrow the workplace.⁴⁵

From these divergent understandings of workplace privacy, we now turn to the themes implicated.

II. SYMPOSIUM THEME 1: INDIVIDUALS AS MEMBERS OF GROUPS

Privacy, a quintessentially solitary notion, finds in the workplace a setting that necessarily excludes some solitude. In the workplace, a person coexists with other people. Isolated locales for human labor are called turrets, garrets, monasteries, and homes—not “the workplace.” In this sense, every workplace contains groups.

For employment lawyers, of course, the line between individuals and groups has more particular urgency. Employment law as a field is an offspring of labor law.⁴⁶ Unions and management are both collectives consisting of many individuals, and the struggle between these two groups is the grand conflict of labor law. If this struggle is the grand conflict of labor law, the grand lament of labor-law scholarship is to mourn the lessening of labor union strength (or “density”), especially in the private sector.

42. *Id.* at 1046.

43. *Accord* Lane, *supra* note 1, at 229 (“For all intents and purposes, bringing a company computer into your home is the equivalent of giving your employer a key to the front door.”).

44. Selmi, *supra* note 6, at 1047.

45. *Id.*

46. At the spoken version of the conference Pauline Kim remarked that having gone to law school in the late 1980s she is of a first generation, a group of employment law scholars who took a class in law school called Employment Law, and so in their studies of the workplace were not limited to the more venerable Labor Law. Kim, *supra* note 5. Selmi, Kim's contemporary, was also of the early employment law generation as a student at Harvard Law School. More senior participants at the conference like Finkin and Craver came to employment law following their teaching and writing about labor law.

No truism about labor and employment gets repeated more often in the law reviews;⁴⁷ our Symposium participants remarked on it as well.⁴⁸

To many in the labor-and-employment community, unions have dwindled not because they became obsolete, but because management attacked them successfully, with the help of pliant federal labor law. As a consequence, individual workers have lost power.⁴⁹ This perspective sees the individual worker as lonely, while the worker united among fellow workers is powerful. A downward spiral for workers emerges: Labor unions dwindle, and appear weak; workers lose faith in unions because of this manifest weakness; workers withdraw their support and engagement from organization drives or existing unions; labor unions dwindle more. A sickly version of individualism enters the worker like a tapeworm, making her unable to come together with her fellows. This perverse individualism tells the worker falsely that she is better off on her own. It is labor and employment law that begat the pejorative "tortification" (to which I coming from Torts first took umbrage, but later came to accept). "Tortification" refers, inter alia, to the seductive effect of workplace torts on worker consciousness: A worker thinks that if harmed by an employer, she can sue and be just as well off as if she could call on the support of a union.⁵⁰

47. On March 10, 2006, I typed "decline w/10 unions" into the Allrev database of Lexis, and got 1110 hits. As "decline" is hardly a universal term of art to describe this phenomenon, I am sure I found only a fraction of the lamentation, even though there were false positives among the 1110 articles.

48. Pauline T. Kim, *Collective and Individual Approaches to Protecting Employee Privacy: The Experience with Workplace Drug Testing*, 66 La. L. Rev. 1009, 1009 (2006); Selmi, *supra* note 6, at 1038 (noting that even in whatever year one chooses to call the peak of the "lost era of labor dominance," nowhere near half of private sector workers were union members).

49. See Charles B. Craver, *Can Unions Survive?: The Rejuvenation of the American Labor Movement* 47-51 (1993); James A. Gross, *Broken Promise: The Subversion of U.S. Labor Relations Policy 1947-1994* (1995) (arguing that current labor policy has, in defiance of congressional intent, turned against workers and unions); Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. Rev. 351, 361-73 (2002) (arguing that if more neutral explanations for the decline of unions-increased globalization, the changing workforce composition, and the rise of contingent work-were correct and complete, then the decline of unions in the United States would be comparable to that in Europe, yet it has been much more severe; employer hostility to unions and weak federal law must be part of the explanation); Julius G. Getman, *Explaining the Fall of the Labor Movement*, 41 St. Louis L.J. 575, 579 (1997) (arguing that federal labor law permits, and perhaps encourages, bad-faith behavior by employers).

50. See Anita Bernstein, *Muss es Sein? Not Necessarily, Says Tort Law*, 67 Law & Contemp. Probs. 7, 13 n.28 (2004) (reviewing "tortification" in the labor

What does privacy have to do with it? Of the participants, Kim focuses most on this question of unions and individuals in the workplace. Her article looks at workplace drug testing as resisted and protested, first by unions and later by individual litigants.⁵¹ This extended analysis of one category of privacy claim from the workplace brings forward not only the doctrinal points that Kim notes—for example, whether unions can waive the privacy rights of an individual worker—but also the larger question of whether the lost strength of unions can ever be equaled or replicated in the workplace by some other means, perhaps a different type of aggregation.⁵² In this discussion, Kim implicitly works with privacy in its “power” aspect.⁵³ Privacy is a good over which unions and management fight, just as they struggle to distribute other goods in the workplace. The trouble with this conception of privacy, as Kim acknowledges (Finkin and Selmi also touch on this point in different ways), is that when thrown into a bundle of distributions that includes more tangible goods—like money, paid leave, and health insurance—privacy cannot make a strong claim on the energies of negotiators.⁵⁴ Unions will cede privacy to gain other goods for members.

The other extended discussion of workplace collectives in this Symposium comes from Craver, who of our contributors focuses the most on overt conflicts between unions and management. He notes that in one struggle that might be seen in terms of privacy, the question of proselytizing and recruitment with respect to organizing drives, employers may treat employees as a captive audience, dinning anti-union sentiment into their ears, while organizers enjoy much less access to workers’ consciousness.⁵⁵

and employment law literature). The trap is that the employee forfeits union power in exchange for

a chance to buy a lottery-ticket shot at the million-dollar judgment that every now and then one lucky abused worker will win. Unions provide protections for continued employment that cover many more workers than wrongful discharge litigation can ever deliver. In this view, tort law becomes the rhetorical favorite of the enemy. Of course, the bosses will say, you don’t need to organize, you can always sue them if they do you wrong. And you won’t have to pay union dues either, imagine! Workplace torts, in short, isolate the individual without protecting his or her rights.

Id. at 14.

51. Kim, *supra* note 48.

52. *Id.* at 1025–31.

53. See *supra* Part I.E.

54. See Kim, *supra* note 48.

55. Craver, *supra* note 7, at 1061.

Similarly, employers commit what might be seen as invasions when they forbid workers from sharing information with one another about their compensation, a silencing policy that the National Labor Relations Act proscribes, but that nevertheless seems to flourish.⁵⁶ Employers also invoke privacy piously when union representatives ask for data about "wages, job classifications, hours, and working conditions," all of which "enable representative unions to decide what to discuss."⁵⁷ Craver, in short, finds workplace privacy a troublesome concept, both for what it does and what it fails to do. When hearing the phrase "workplace privacy" Craver, along with Kim, thinks of power and unions.⁵⁸ He concludes that if something resembling "workplace privacy" can silence conversations between workers, deny their representatives access to facts necessary for collective bargaining, and keep organizers away from the worksite, then perhaps privacy is a problem rather than a desideratum to be pursued.⁵⁹

III. SYMPOSIUM THEME 2: AGAINST EMPLOYMENT AT WILL

The venerable Clyde Summers has written that this peculiar stance of American law conceives of "the employment relation as a dominant-servient relation rather than one of mutual rights and obligations."⁶⁰ Supreme authority over the worker becomes a triumph for management:

The employer, as owner of the enterprise, is viewed as owning the job with a property right to control the job and the worker who fills it. That property right gives the employer the right to impose any requirement on the employee, give any order and insist on obedience, change any term of employment, and discard the employee at any time. The employer is sovereign over his or her employee subjects.⁶¹

As Professor Summers describes employment at will, this doctrine extends far beyond the mutual prerogative of two contracting parties to commence and terminate their dealings as they please:

56. *Id.* at 1065–66.

57. *Id.* at 1066.

58. *See id.*

59. *Id.*

60. Summers, *supra* note 8, at 78.

61. *Id.*

Its tentacles reach into seemingly remote areas of labor law, for at its roots is a fundamental legal assumption regarding the relation between an employer and its employees. The assumption is that the employee is only a supplier of labor who has no legal interest or stake in the enterprise other than the right to be paid for labor performed. The employer, as owner of the enterprise, is legally endowed with the sole right to determine all matters concerning the operation of the enterprise.⁶²

Once a legal system accepts employment at will, as several Symposium contributors observe, it becomes hard for that system to honor the privacy of employees in the workplace.⁶³ The conclusion runs *a fortiori*: Any worker who can be discharged “for good reason, bad reason, or no reason at all”⁶⁴ must surely have to endure less adverse actions without recourse. An invasion of privacy in this light becomes merciful rather than arbitrary: “I could fire you and have security guards escort you from my property this instant,” says the employer in effect, “but instead I choose only to [read your e-mail or blog] [draw blood or urine from your body] [take pictures of you by stealth]. By this means, I propose a mere modification of our agreement. If you don’t like it, fine: you share the same prerogative of termination that I hold; you should end our relationship if you so desire. If you don’t avail yourself of this choice, then I shall assume you are content to maintain our employment contract on the new terms.”⁶⁵

And so Fisk regretfully advised an electrician ordered to wear khaki trousers at work that he had to choose between resigning and putting on the offending garment, which would have led to humiliation at work: Due to a medical condition, the man’s body produced an excess of perspiration that would look like urine stains

62. *Id.* at 65.

63. Selmi, *supra* note 6, at 1036 (“As a basic precept, it is difficult to reconcile workplace privacy with the at-will relationship.”); Finkin, *supra* note 27, at 948) (describing a law review article defending employer control over employees’ off-work activity as “worthy of consideration [only] because it perfectly captures Americans’ managerial ideology”).

64. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 Colum. L. Rev. 1527, 1596 n. 297 (2002). The oft-cited case here is *Payne v. Western & Atlantic Railroad*, 81 Tenn. 507, 526–27 (1884).

65. This kind of reasoning goes all the way back to *Payne*, the 1884 decision that serves as a founding document of employment at will. *See supra* note 64; *Payne v. Western & Atlantic Railroad*, 81 Tenn. 507, 519–20 (1884) (“All may dismiss their employees at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong. A *fortiori* they may ‘threaten’ to discharge them without thereby doing an illegal act, per se.”).

against a light-colored fabric background. His employer refused to grant him an exception from the dress code that would let him wear navy blue, and so the electrician chose to quit his job.⁶⁶ Willborn adverts to employment at will when he advocates treating waivers signed by the employee at the time of employment (where the waivers often should be enforced) differently than waivers signed, say, "after ten years of employment"⁶⁷ (where the waivers often should not be enforced). Employment at will ideology notwithstanding, employees enjoy much more of their free "will" when the relationship begins, but can suffer from coercion later. Gely and Bierman note that employment at will has resulted in "little legal protection to employees facing employer discipline for work-related or other blogging."⁶⁸ It allows an employer to fire an employee for the offense of bringing a woman not his wife to a company banquet and for marrying a co-worker⁶⁹—two episodes presented to the courts (unsuccessfully) as privacy-violating management diktat.⁷⁰ Kim tips her hat to employment at will when she remarks that employees who do not want to submit to drug tests can respond by "exiting the workplace or avoiding employers that require testing."⁷¹ Craver responds in a similar manner when writing about "paper and pencil tests that purportedly measure test-taker honesty": "Since applicants who do not wish to take such tests can simply look for work elsewhere, courts would be unlikely to find that these testing practices violate basic privacy rights."⁷² In sum, every contribution in this Symposium has paused at least once over employment at will.

IV. THE JOB OF WORKPLACE PRIVACY

To review: Workplace privacy has many facets. Among those that emerge in this Symposium—and this list is not exhaustive—are the human aversion to surveillance, autonomy, the hard-to-translate *Persönlichkeitsrecht* (the German legal category encompassing personality and personhood), secrets, and struggles over power and powerlessness. Contributors have invoked these concepts in their discussions of workplace privacy. Along with this diverse range of aspects, their contributions also present two unifying themes: (1) a dialectic between individualistic and

66. Fisk, *supra* note 20, at 1114–15.

67. Willborn, *supra* note 5, at 986.

68. Gely & Bierman, *supra* note 15, at 1091.

69. *Id.* at 1094.

70. *Id.*

71. Kim, *supra* note 48, at 1026.

72. Craver, *supra* note 7, at 1073.

collectivist understandings of what it means to be a worker inside a workplace during these days (or decades) of union decline, and (2) a concern with employment at will, the American legal doctrine that appears to crush whatever privacy entitlements a worker might wish to assert.

Do the themes of the last paragraph cohere? I believe so. Our seven papers together present a view of the functions that "workplace privacy," that maddeningly ineffable phrase, performs within employment law.

Start with employment at will—which is, by no means a monolithic shield against employee complaint.⁷³ One state has abolished the doctrine by statute,⁷⁴ while others have produced a range of judicial decisions that reduce its application: they offer remedies for wrongful discharge that rely on a panoply of protective constructs.⁷⁵ Commentary on the doctrine (if one puts aside some non-normative work about its origins in American legal history⁷⁶) is overwhelmingly hostile.⁷⁷ The doctrine lingers, however,⁷⁸ because neither state legislatures nor Congress nor state courts nor federal courts seem inclined to challenge the basic claim that employment is a contract that should remain intact only to the

73. My two home states, New York and Georgia, have been described as exceptionally faithful to the doctrine. Robert C. Bird, *Rethinking Wrongful Discharge: A Continuum Approach*, 73 U. Cin. L. Rev. 517 (2004) ("On one extreme, Georgia, Alabama, and New York adhere rigidly to employment at will and permit few, if any, exceptions to the rule.").

74. Wrongful Discharge from Employment Act, Mont. Code Ann. §§ 39-2-901 (2005).

75. Anne M. Rector, *Use and Abuse of Urinalysis Testing in the Workplace: A Proposal for Federal Legislation Limiting Drug Screening*, 35 Emory L.J. 1011, 1022 (1986) (classifying judicially created exceptions as relying on public policy, implied-in-fact covenants, implied covenants, or public policy torts). See also Summers, *supra* note 8, at 75 (noting that five states limit employment at will by imposing a covenant of good faith and fair dealing).

76. See Deborah A. Ballam, *Exploding the Original Myth Regarding Employment-at-Will: The True Origins of the Doctrine*, 17 Berkeley J. Lab. & Emp. L. 91, 96-98 (1996) (summarizing historical surveys).

77. See Stephen D. Sugarman, "Lifestyle" Discrimination in Employment, 24 Berkeley J. Emp. & Lab. L. 377, 426 (2003) ("At will" employment has been criticized by many scholars, various task forces, and so on."). But see Robert Howie & Lawrence Shapero, *Lifestyle Discrimination Statutes: A Dangerous Erosion of At-Will Employment, a Passing Fad, or Both?*, 31 Emp. Rel. L.J. 21 (2005) (defending and extending the doctrine).

78. Sugarman, *supra* note 77, at 426 ("It is not the rule in Europe or Japan, for example. Yet, for the present, only Montana has replaced it, and there is little reason to believe that other states will soon be added to the list."); see also Summers, *supra* note 8, at 85 (claiming that "the trend in the last ten years has been toward more employer dominance").

extent that both employer and employee wish to continue it, and into whose terms the government will typically not intrude.

At first look, the reasoning about workplace privacy *a fortiori* that we have considered appears impeccable. A greater prerogative (the power to discharge a worker without cause) must imply a lesser one (the power unilaterally to impose working conditions that might offend some employees enough to drive them from the job). Yet this reasoning may be peccable after all. The greater might not always imply the lesser. To start, most employees, managers, lawyers, labor and employment scholars, legislators, and judges active today came of age in the workplace after enactment of the Civil Rights Act of 1964. Those whose arrival at work predated federal civil rights legislation have had decades to get used to the notion that an employer may not impose detriments on workers based on certain characteristics. Accordingly, it is fair to say that most of us who look at, or earn our living in, the workplace hold two notions simultaneously in our heads: (1) an employer may discharge a worker without cause, for bad cause, for no cause,⁷⁹ and yet (2) may not discharge a worker on the basis of, say, race.

From there, it may not be inconsistent for workers and those who study them to believe that (1) employment at will is a fixture in American law, and not an intolerable one; it may resonate in the United States along with prevalent beliefs about the nature of freedom in a market economy,⁸⁰ and yet (2) once the "will" of an employer joins the "will" of an employee or a prospective employee to form a durable employment relation, that relation ought to honor the privacy interest that workers bring to their jobs. This notion of privacy might include *Persönlichkeitsrecht*, freedom from (unjustified) surveillance, autonomy, or the desire for a modicum of power. Certainly I do not mean to say that privacy in this sense will always create entitlements for workers that the law should enforce. Participants in this Symposium speak plainly about privacy claims that they say ought to be resolved, without anguish, in favor of employers.⁸¹ My suggestion instead is that

79. See Estlund, *supra* note 64.

80. Gabrielle S. Friedman & James Q. Whitman, *The European Transformation of Harassment Law: Discrimination Versus Dignity*, 9 Colum. J. Eur. L. 241, 267 (2003) ("At-will employment is much more familiar and well-accepted in America than on the continent—both in American law and in the mobile culture of American employment markets. By tradition, Americans routinely leave jobs, moving on to something else, just as they routinely leave one part of the country to move to another.").

81. Selmi, *supra* note 6, at 1042–43 ("Concerns about trade secrets, possible harassment suits, employee theft, efficiency in the workplace, unauthorized use

recognition of privacy interests, just like recognition of an interest in freedom from employment discrimination, can coexist with employment at will.⁸²

The articles of this Symposium, particularly the contribution of Finkin, may be interpreted to go a step further: The United States might one day abandon employment at will as unsound. We have already noted that the smart money is betting on its continued force.⁸³ Perhaps the pressures of globalization will shove the doctrine into Europe and other industrialized nations that to date have resisted it. Should the opposite teaching—a Montana-style American repudiation of employment at will—gain strength, I believe the concept of workplace privacy will have earned much of the credit.

Contributions to this Symposium make the point in their numerous references to the dignity of a worker. Unlike the concepts identified above as aspects of workplace privacy, the notion of dignity is not, to our contributors, a defining element the way autonomy or *Persönlichkeitsrecht* might be. Yet the theme is pervasive. When Finkin writes about the master-servant relationship, for example, he recalls “the natural and inevitable authority of the master” as a source of contemporary managerial prerogative.⁸⁴ He does not expressly say, but a reader may surely infer, that this tradition affronts the dignity of an adult human being. The contribution of Fisk is all about dignity: as she argues, humiliation derives from loss of autonomy.⁸⁵ Willborn builds his

of property, and so on, all justify keeping a watch on employees in a way that might infringe upon their privacy interests.”) (noting that “the employee has been hired to work, and has no right to send private emails, view pornography, shop, blog, instant message, or talk on the phone.”); Craver, *supra* note 7, at 1069 (“Despite the fact that most employees think they enjoy certain privacy protections at work, they do not. As a result, companies can lawfully keep track of everything they type on their computers.”).

82. To the extent that employment at will must give way to recognition of workplace privacy, I agree with Professor Corbett that common law development rather than new legislation will be the instrument. See Corbett, *supra* note 1. Vaguer and less determinate than the proscribed categories of civil rights legislation, claims of privacy call for a more flexible and nuanced enforcement than what a statute can provide. See generally Marley S. Weiss, *The Impact of the European Community on Labor Law: Some American Comparisons*, 68 Chi.-Kent L. Rev. 1427, 1441 (1993) (“It is no accident that the most substantial derogation from managerial control, the erosion of the employment-at-will doctrine, has been crafted by state judges rather than legislators.”)

83. See Sugarman, *supra* note 77, at 426; Summers, *supra* note 8.

84. Finkin, *supra* note 27, at 956.

85. Fisk, *supra* note 20, at 1125–26, 1136–46.

argument with reference to offensiveness.⁸⁶ In her analysis of the relative strengths of collective- and individual-initiated litigation, Kim focuses on workers' dignity as likely to get short shrift when unions rather than individuals bring suit.⁸⁷ Selmi disparages privacy as relatively unimportant when he notes the indignity of not earning a decent wage.⁸⁸

Given that all the contributors care about employment at will,⁸⁹ their frequent references to dignity may suggest a connection between the two concepts. A worker asserting her own dignity might start by conceding the contractual basis of her employment. "But that doesn't mean I'm not a human being," she might continue. "I've agreed to work here and you have agreed to employ me. That doesn't mean . . ." and here she could mention a particular offense. In the skein that I find connecting the contributions of this Symposium, assertions of privacy and erosions of employment at will are woven together. Joining the consensus expressed in Baton Rouge, I see no other development—in particular, no statute⁹⁰—that could have so much force in the struggle against employment at will in its hypertrophic form.

In particular labor unions, noteworthy within our Symposium Theme 1, cannot handle the job of eroding employment at will by making claims about trammelled worker dignity. Unions are structured to fight for material gains and inclined to downplay what look like idiosyncratic individual needs. Accordingly, our participants have concluded that unions are doing little to advance workplace privacy.⁹¹ At the "live" portion of this Symposium, participants expressed some regret and nuance on this point. Pauline Kim noted that privacy norms are grounded in collectives: without groups of human beings, it becomes absurd to speak of privacy violations.⁹² Steven Willborn said that abandoning the collective as a privacy-rights negotiator must imperil the collective in its work of making other claims of power.⁹³ In other words,

86. Willborn, *supra* note 5, at 982–85, 988–95.

87. Kim, *supra* note 48, at 1031.

88. Selmi, *supra* note 6, at 1045–46.

89. See *supra* Part III.

90. See generally Lane, *supra* note 1, at 254–58 (summarizing failed congressional legislation that would have protected employees' interests generally and their privacy rights in particular).

91. See *supra* pp. 931–32.

92. Kim, *supra* note 5.

93. Steven Willborn, Dean & Schmoker Professor of Law, University of Nebraska College of Law, Workplace Privacy: The Role of Employee Consent, Address at the Louisiana Law Review Symposium: Privacy in the Workplace (Feb. 9, 2006).

weak unions mean a continuation of current weak workplace privacy rights.

Fair enough: but let me end this Foreword on an optimistic note, building on where our contributors have gone beyond the standard requiem for a dead institution; they have suggested a vital role for the collective as a source of workplace privacy. That private-sector labor unions are moribund they do not deny. But they do not leave the privacy-seeking individual in the workplace without peers and support. Here are two of their ideas, one from the spoken portion of the conference, and another that readers may extract from the pages that follow.

At a question-and-answer session, Gely offered a suggestion about groups and collectives: Perhaps solidarity for workers can emerge outside the formally recognized collective bargaining unit, he remarked.⁹⁴ We do not yet know, here in 2006, whether the blogs that he and Bierman write about here are an idle fad; whether online or virtual “communities” have any substantive content; or how to identify power in media that can vanish in a click. We can be sure, however, that communication technology is altering relationships among human beings at an extraordinary pace. Although linked by new media, persons are likely to retain their old, longstanding desire for connection with other persons. American law inhibits them from forming labor unions;⁹⁵ but technological change, or some other phenomenon not yet in sight, might foster human unions of another kind.

Complementing this expression of tentative faith in a new collective, Selmi has sought to give this new entity a place to do its work. It has become a cliché to castigate our 24/7 machines—our cell phones, handheld palm-style computers, global positioning devices, networked information systems—as an electronic leash that ties workers to managerial prerogative. Selmi reminds us that these machines have off buttons. Go on, press yours. Refuse the “free” company car that beams your location to a tracking device; claim your down time and take a real vacation; and if you feel you can’t say no to the beep summons, a few new laws could help build you your barrier.⁹⁶

94. Gely, *supra* note 17.

95. See *supra* Part II.

96. Selmi, *supra* note 6, at 1045.

V. CONCLUSION

Separately and as a whole, the articles in this Symposium use familiar concepts to look at workplace privacy anew. They present this subject as both a manifestation of what now occupies all of employment law—especially employment at will and the tension between collective and individualistic understandings of the American worker—and a source of future change in this body of law. Our contributors find in workplace privacy an opportunity to reflect on employment law in its entirety. What do we talk about when we talk about workplace privacy? All of employment law—along with the hopes and distress that we as individuals bring to this subject.

When we talk about workplace privacy, we also talk about privacy unmodified. Consider the choice manifested in Finkin's *Privacy in Employment Law*, where the introduction begins with a discussion of privacy simpliciter, rather than workplace privacy:⁹⁷ the two categories are not easily isolated from each other. Fast-moving technological change and a so-named war on terror that perceives danger to lurk in ordinary civilian life have combined to threaten "secrecy, solitude and anonymity,"⁹⁸ by means that individuals find hard to anticipate until after they experience what feels like a violation. These changes make privacy claims harder to express.

Here, the workplace lends a hand. Though unlikely to succeed in a court or grievance proceeding, claims by workers against employers provide a forum to speak about the boundary between tolerable and intolerable intrusions that escapes preemptive assertions. Such preemptions can cut off discussion: "You don't understand the technology," a silencer might say; other contexts can provoke references to "national security," or even suggestions that the speaker has taken up the cause of terrorism.⁹⁹ As a source of context, experiences in the varied world of American employment foster a necessary conversation. Most people work. Most jobs are capable of accommodating some conception of employee privacy, a line that employers should not cross. Workplace privacy still eludes definition, but has a function: it helps us talk about what individuals need to live well in a free society.

97. See *supra* note 3.

98. See Willborn, *supra* note 11.

99. See David Sarasohn, *Administration Throws Mud While Losing Ground*, Newhouse News Serv., Mar. 17, 2006 (reporting that national political figures, including Senator Wayne Allard and Representative John Boehner, the House Majority Leader, accused Senator Russell Feingold of "siding with terrorists" when he introduced a measure to censure President Bush for wiretapping without a court order).

