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The Need for a Revitalized Common Law of the Workplace*

William R. Corbett†

I. INTRODUCTION

In 1960 only two major federal statutory laws regulated employment in the United States. The National Labor Relations Act (NLRA) was enacted in 1935.¹ The NLRA was followed by the Fair Labor Standards Act in 1938.² For the next twenty-five years, no federal labor statutes were enacted. Then, for a thirty-year period beginning in 1963, Congress enacted a host of employment laws: the Equal Pay Act,³ Title VII of the Civil Rights Act of 1964,⁴ the Age Discrimination in Employment Act (ADEA),⁵ the Occupational Safety and Health Act (OSHA),⁶ the Employee Retirement Income Security Act (ERISA),⁷ the Pregnancy Discrimination Act (PDA),⁸ the

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¹ Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-69 (2000)).

² Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201-19 (2000)).

³ Pub. L. No. 88-38, 77 Stat. 56 (1963) (codified as amended at 29 U.S.C. § 206(d) (2000)).

⁴ Pub. L. No. 88-352, 78 Stat. 66 (1964) (codified as amended at 42 U.S.C. §§ 2000a to 2000e-15 (2000)).

⁵ Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621-33a (2000)).

⁶ Pub. L. No. 91-596, 84 Stat. 1590 (1970) (codified as amended at 29 U.S.C. §§ 651-78 (2000)).

⁷ Pub. L. No. 93-406, 88 Stat. 29 (1974) (codified as amended at 29 U.S.C. §§

Employee Polygraph Protection Act (EPPA),⁹ the Worker Adjustment and Retraining Notification Act (WARN Act),¹⁰ the Americans with Disabilities Act of 1990 (ADA),¹¹ the Civil Rights Act of 1991¹² and the Family and Medical Leave Act of 1993 (FMLA).¹³ The first three years of the 1990s, with the enactment of three major laws, is a particularly notable period for the proliferation of employment legislation.¹⁴ However, the FMLA, the last generally applicable federal employment law, is now ten years old. Since 1993, legislation has been proposed but stalled in Congress.¹⁵

From the dearth of federal employment legislation since 1993, one might conclude that no significant employment issues have arisen or that another means has been found for

1001-1461(2000)).

⁸ Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. §2000e(k) (2000)).

⁹ Pub. L. No. 100-347, 102 Stat. 646 (1988) (codified as amended at 29 U.S.C. §§ 2001-09 (2000)).

¹⁰ Pub. L. No. 100-379, 102 Stat. 890 (1988) (codified as amended at 29 U.S.C. §§ 2101-09 (2000)).

¹¹ Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. § 12101-12213 (2000)).

¹² Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified at 42 U.S.C. §1981a and other scattered sections of 42 U.S.C. (2000)).

¹³ Pub. L. No. 103-3, 107 Stat. 6 (1993) (codified at 29 U.S.C. §§ 2601-54 (2000)).

¹⁴ One way of gauging the ascendancy of an area of the law is to consider law school curricula. See Thomas C. Kohler, *The Disintegration of Labor Law: Some Notes for a Comparative Study of Legal Transformation*, 73 NOTRE DAME L. REV. 1311 (1998). Until employment discrimination appeared in the 1970s in law school curricula, labor law in both scholarship and curricula meant collective bargaining and the National Labor Relations Act. Steven L. Willborn, *Individual Employment Rights and the Standard Economic Objection: Theory and Empiricism*, 67 NEB. L. REV. 101 (1988). Even after employment discrimination became established in law schools, it would be the early- to mid-1990s before employment law became a course offering. Douglas L. Leslie, *Retelling the International Paper Story*, 102 YALE L.J. 897, 1906 n.32 (1993) (noting that law schools were starting to offer "employment law" courses, and predicting that they would push "labor law" into the specialty category); Steven Howard Kropp, *Rethinking the Labor and Employment Law Curriculum: Legal Education's Belated Response to the Demise of Collective Bargaining and the Rise of Individual Rights*, 60 U. CIN. L. REV. 433 (1991) (book review) (reviewing individual employment rights casebooks).

¹⁵ Consider, for example, the Employment Non-Discrimination Act, which would amend Title VII of the Civil Rights Act of 1964 to prohibit employment discrimination based on sexual orientation. The bill was reintroduced in the House and Senate on July 31, 2001. That bill was first introduced in 1994. *ENDA Will be Re-Introduced in Congress on July 31*, DAILY LAB. REP. (BNA), July 30, 2001 (No. 145), at A8. Electronic monitoring bills have been introduced since the early 1990s, but none have been enacted. See *infra* notes 150-58 and accompanying text. Genetic discrimination bills have been introduced in recent congressional sessions, but they have not been enacted. See *infra* notes 171-76 and accompanying text.

addressing such issues. Yet, the need to protect employees from abuses in the workplace has not significantly dissipated, and in some respects may have increased. Disrespect, incivility, humiliation of workers,¹⁶ and the invasion of their privacy¹⁷ are not rare in American workplaces. Indeed, science and technology have posed at least three significant new threats to the dignity and autonomy of workers. First, workers today fear the Orwellian nightmare that "Big Brother"¹⁸ employer will invade their privacy by using technology to record their conversations, monitor their e-mail communications, and track their Internet use.¹⁹ Second, it is possible that employers may obtain genetic information about their employees and use it to decide whom to hire, fire, promote, or subject to other employment actions.²⁰ Although generally treated as an

¹⁶ See, e.g., Catherine L. Fisk, *Humiliation at Work*, 8 WM. & MARY J. WOMEN & L. 73 (2001); David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475 (2000); The Workplace Bullying & Trauma Institute Website (formerly the Campaign Against Workplace Bullying), at <http://www.bullyinginstitute.org> (last visited Feb. 13, 2003); Marilyn Elias, *Study: Rudeness is Poisoning U.S. Workplace; Disrespect Causes Anxious Employees, Lower Productivity*, USA TODAY, June 14, 2001, at D1; Pat Karlak, *Rude, Rude, Rude: Workplace Incivility Is on the Rise and Companies Are Taking Notice*, CHI. DAILY HERALD, Feb. 27, 2001, at 1; *Effects of Workplace Incivility Widespread, Likely to Linger, Research Study Concludes*, DAILY LAB. REP. (BNA), June 19, 2001 (No. 117), at A4.

¹⁷ Regarding the various types of invasion of privacy, see generally MATTHEW W. FINKIN, *PRIVACY IN EMPLOYMENT LAW* (1995 & Cumulative Supp. 1997 & Supp. 2001). In the seminal article on the right of privacy, Warren and Brandeis wrote that in cases of intrusion into privacy, the violation is a "blow to human dignity, an assault on human personality." Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 197-198 (1890); see also Pauline T. Kim, *Privacy Rights, Public Policy, and the Employment Relationship*, 57 OHIO ST. L.J. 671 (1996).

¹⁸ GEORGE ORWELL, 1984 (1949).

¹⁹ See, e.g., Am. Mgmt. Ass'n, *2001 Survey: Workplace Monitoring & Surveillance: Policies and Practices* (Aug. 7, 2001), results reprinted in *Employers Watching Computer Use for Legal Liability, AMA Survey Finds*, DAILY LAB. REP. (BNA), Aug. 9, 2001 (No. 153), at A5 (reporting that, of 435 employers surveyed, more than 60% monitor employees' Internet connections, and about 47% store and review employees' e-mail messages); Jay P. Kesan, *Cyber-Working or Cyber-Shirking? A First Principles Examination of Electronic Privacy in the Workplace*, 54 FLA. L. REV. 289 (2002); Eric P. Robinson, *Big Brother or Modern Management: E-Mail Monitoring in the Private Workplace*, 17 LAB. LAW. 311 (2001); S. Elizabeth Wilborn, *Revisiting the Public/Private Distinction: Employee Monitoring in the Workplace*, 32 GA. L. REV. 825 (1998); Charles E. Frayer, Note, *Employee Privacy and Internet Monitoring: Balancing Workers' Rights and Dignity With Legitimate Management Interests*, 57 BUS. LAW. 857 (2002); Amanda Richman, Note, *Restoring the Balance: Employer Liability and Employee Privacy*, 86 IOWA L. REV. 1337 (2001); Nathan Watson, Note, *The Private Workplace and the Proposed "Notice of Electronic Monitoring Act": Is "Notice" Enough?*, 54 FED. COMM. L.J. 79 (2001).

²⁰ See, e.g., Pauline T. Kim, *Genetic Discrimination, Genetic Privacy: Rethinking Employee Protections for a Brave New Workplace*, 96 NW. U.L. REV. 1497

employment discrimination issue, employers' obtaining and using employees' genetic information is more effectively conceptualized and addressed as an invasion of privacy issue.²¹ A third major issue regarding mistreatment of employees in the workplace stems, in part, from the fast-paced, around-the-clock, pressure-packed work environment of the global market. Workers are complaining of bullying and harassment by their supervisors and co-workers.²² For many, the abuse they suffer in the workplace may affect both their health and quality of life, as well as their employer's productivity and ability to provide a safe workplace.

Facing problems of electronic monitoring, genetic discrimination, and harassment (not limited to abuse based on protected status), as well as increasing public attention to these issues, Congress might respond, as it has to past workplace problems, with federal legislation. Both members of Congress and many employee rights advocates are promoting federal legislation to address these problems. So far, all such proposals have failed at the federal level and only genetic discrimination laws have passed at the state level. Still, employee rights advocates and scholars in the United States favor individual employment rights legislation, particularly at the federal level, to address workplace issues.²³ And why not? Title VII and the anti-discrimination principles and theories

(2002); Mary Z. Makdisi, *Genetic Privacy: New Intrusion a New Tort*, 34 CREIGHTON L. REV. 965 (2001); Glendora Hughes, *Genetically Incorrect*, 35 MD. B.J. 34 (Jan./Feb. 2002); Paul Steven Miller, *Is There A Pink Slip in My Genes? Genetic Discrimination in the Workplace*, 3 J. HEALTH CARE L. & POL. 225 (2000); David J. Wukitsch, *New York's Legal Restrictions on the Employer's Collection and Use of an Employee's Genetic Information*, 9 ALB. L.J. SCI. & TECH. 39 (1998); Jared A. Feldman & Richard J. Katz, Note, *Genetic Testing & Discrimination in Employment: Recommending a Uniform Statutory Approach*, 19 HOFSTRA LAB. & EMP. L.J. 389 (2002). In the initial lawsuit of its kind, the EEOC sued Burlington Northern Santa Fe Railway Co. for genetic testing of employees, alleging a violation of the Americans with Disabilities Act. On May 6, 2002, the case settled for \$2.2 million. See *EEOC's First Genetic Testing Challenge Settled for \$2.2 Million, Parties Announce*, DAILY LAB. REP. (BNA), May 9, 2002 (No. 90), at A1 [hereinafter *EEOC's First Genetic Testing Challenge*].

²¹ See *infra* notes 177-80 and accompanying text; see also Kim, *supra* note 20.

²² See sources cited *supra* note 16.

²³ Kenneth G. Dau-Schmidt, *Meeting the Demands of Workers into the Twenty-First Century: The Future of Labor and Employment Law*, 68 IND. L.J. 685, 698 (1993) (noting the current preference for legislative regulation); Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L. J. 1, 32 n.128 (1999) ("In part, the preference for Title VII [rather than torts to address harassment claims] may reflect a scholarly bias in favor of federal law."); cf. J. Wilson Parker, *At-Will Employment and the Common Law: A Modest Proposal to De-Marginalize Employment Law*, 81 IOWA L. REV. 347, 370 (1995) (labeling wrongful discharge legislation "the deus ex machina of employment law").

that emanate from it are the greatest triumph of employment law in the United States.²⁴

The failure to enact federal legislative responses to emerging workplace issues does not necessarily signal the demise of employment law in the United States. What it may signal is the end of an era, spanning about thirty years, when federal legislation was the legal method of choice to address emerging workplace problems. We have reached a point in the development of American employment law at which the regulatory panacea for the latter half of the twentieth century has become very difficult to implement. That situation is likely to be exacerbated in the years ahead. The era of federal employment legislation as the predominant type of employment law may be over – at least for a while.²⁵

Regardless of whether an epoch in employment law history has passed, at this point in time individual employment rights legislation is not an appropriate response to these emerging workplace problems.²⁶ This is so for three reasons that apply, to varying degrees, to each of the three issues – electronic monitoring, genetic discrimination, and general harassment. The first is “fit.” It is difficult to draft legislation that effectively addresses these problems – in other words, that fits the problems. They require analytical flexibility that cannot be readily built into a statute. Such flexibility is necessary both because of the variety of factual situations, and the lack of consensus on the societal balancing of the conflicting interests of employers and employees. On the issue of electronic monitoring in particular, employers’ interests are numerous and credible; consequently, it is not clear how and

²⁴ See Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 85 (2000) (identifying the employment anti-discrimination laws as “[t]he one form of relatively effective legal protection of workers”); see also Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 61 (2000) (calling equal protection and anti-discrimination law “[o]ne of the epic legal developments of the twentieth century”); cf. Kim, *supra* note 20, at 1524 (discussing the early successes of Title VII in battling employment discrimination in the decade after its passage, but questioning its current efficacy).

²⁵ I am not predicting that no more federal employment legislation will be enacted in the foreseeable future, and I certainly am not urging that result. For some workplace issues, such as discrimination against homosexuals, amending Title VII is an obvious response and a natural extension of the extant employment discrimination laws. I am arguing, however, that over-dependence on federal legislation must end.

²⁶ It may never be, but as I will discuss below, it is premature to reach that conclusion.

under what circumstances U.S. society should prohibit electronic monitoring by employers. Nor is it clear for what types of harassing or bullying conduct, and by what persons, society should hold employers liable. Further development of the law is needed on a case-by-case basis. At some point, sufficient consensus in the case law may develop, allowing federal or state legislatures to incorporate the standards into a statute. However, it is also possible that some or all of these issues require the flexibility of common law analysis, as the cases may be so fact-driven that statutes will never be an effective method for addressing them. Thus, fit may never be achieved for one or more of these employment issues.

Second, the timing is wrong for legislative responses to these problems. Legislation and common law are often interdependent and dynamic: As one develops to address an issue inadequately met by the other, it sometimes provokes change in the other. For example, in the 1970s and 1980s, common law tort theories proved no answer to the pervasive problem of sexual harassment. Consequently, the theory of sexual harassment was developed under Title VII.²⁷ Thereafter, the common law tort of intentional infliction of emotional distress became a reliable alternative theory of recovery for victims of sexual harassment.²⁸ Thus, the federal legislation prompted an evolution in the common law. Conversely, the common law theories of wrongful discharge and breach of the covenant of good faith and fair dealing led to the passage of the Montana Wrongful Discharge from Employment Act²⁹ and other state statutory responses to wrongful discharge.³⁰ Because of the fit problems discussed above, it is time for common law to take the lead and provide responses to the emerging workplace problems of electronic monitoring, genetic discrimination and bullying. Legislation may follow later.

Third, despite the success of past employment legislation, resorting to this method of regulation too often can generate significant backlash. Statutory employment laws have problems and weaknesses,³¹ and no shortage of opponents who

²⁷ See, e.g., John J. Donohue III, *Advocacy Versus Analysis in Assessing Employment Discrimination Law*, 44 STAN. L. REV. 1583, 1610-11 (1992).

²⁸ See Mark P. Gergen, *A Grudging Defense of the Role of the Collateral Torts in Wrongful Termination Litigation*, 74 TEX. L. REV. 1693, 1709-10 (1996).

²⁹ MONT. CODE ANN. §§ 39-2-901 to 914 (2002).

³⁰ See *infra* notes 250-59 and accompanying text.

³¹ See, e.g., Kim, *supra* note 20, at 1525-32.

trumpet those problems. Moreover, legislation provides a far more concrete target for opponents than evolving common law. The attack can be launched against the specific legislation or the general proliferation of statutes regulating the workplace. Although it may sound unusual to employee rights advocates in the hire-and-fire legal regime of the United States,³² there are many who criticize the considerable expansion of employment legislation in the last forty years.³³ Regardless of one's view about the need for more employment protections in the United States, it is undeniable that there was a rapid proliferation of statutory employment law from 1963 to 1993.³⁴ Overlap and conflict among employment laws creates problems³⁵ and lends credibility to the view that we have experienced employment law sprawl in this nation. For example, some argue that genetic discrimination laws duplicate protection provided by the Americans with Disabilities Act.³⁶ In short, employment law has enough enemies. Its friends need to make careful and deliberate choices about the methods of regulation for the future so that they do not play into the hands of its opponents. Now is not the appropriate time and these are not the appropriate issues for enacting new employment legislation.

Emerging workplace issues afford the opportunity to correct an over-dependence on legislation to regulate

³² Thomas C. Kohler, *The Employment Relation and Its Ordering at Century's End: Reflections on Emerging Trends in the United States*, 41 B.C.L. REV. 103, 103-04 (1999) ("As is generally well known, the United States historically has provided comparatively meager formal legal protections of the employment relationship. Foreign observers typically characterize us as a 'hire and fire' society . . .").

³³ Chief among the critics are libertarian and law-and-economics scholars such as Richard Epstein. See, e.g., RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992); Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984); see also WALTER OLSON, *THE EXCUSE FACTORY: HOW EMPLOYMENT LAW IS PARALYZING THE AMERICAN WORKPLACE* (1997).

³⁴ Kohler, *supra* note 32, at 104 ("Despite our renown for relatively abstemious public intervention in workplace relationships and our general preference for private ordering, the previous ten to fifteen years has been a period of unusual legislative and judicial activity.").

³⁵ Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 18-19 (1988) (predicting that reconciling overlapping protections would be the most difficult problem in employment law and stating that "[o]ne can scarcely imagine an arrangement better designed to hold out promises to the employee, harass and impoverish the employer, enrich the lawyers, and clog the legal machinery.").

³⁶ Sen. Kennedy to Address Genetic Bias Bill's Overlap of ADA, Privacy Regulations, DAILY LAB. REP. (BNA), July 26, 2001 (No. 143), at A1; *Overlap in Genetic Bias Legislation Is Examined in House Hearing on Bill*, DAILY LAB. REP. (BNA), July 12, 2001 (No. 133), at A8.

employment. The stated concerns demonstrate not just that legislation would be a poor response now, but also suggest what is needed: a revitalized common law of the workplace. It is odd that the common law applicable to one of the most significant aspects of most people's lives³⁷ has fallen into relative desuetude and is no longer viewed as a viable approach to addressing workplace problems.

In contrast, during the 1970s and 1980s, state courts explored innovations in tort and contract law to address dissatisfactions with perceived abusive discharges under the employment-at-will doctrine.³⁸ Unlike those common law responses, courts today will not need to create new common law theories; the tort theories of invasion of privacy and intentional infliction of emotional distress can be tweaked to do the job. Notably, however, as with the common law developments of the earlier period, courts will have to overcome their concerns that adjusting the tort theories to accommodate the workplace will impinge too much on employers' power and prerogative.

It is true that common law development is slow and incremental compared with the passage of legislation.³⁹ Furthermore, it does not have the panache or newsworthiness of legislation. But the common law does have some advantages. Its flexibility can accommodate a variety of situations that are difficult to address through legislation. It permits standards to evolve as society, in a panorama of cases, considers the

³⁷ Americans work more hours than any other people in the world and define themselves largely by their work. *U.S. Workers Put in Longer Hours But Were Outpaced in Production, Says Study*, DAILY LAB. REP. (BNA), Aug. 31, 2001 (No. 169), at A6 (quoting the economist who led the survey for the International Labour Organization: "American workers have a tendency to define ourselves by what we do for a living. American workers keep working longer and longer and longer hours."); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1886-91 (2000); Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace For Labor and Employment Law*, 48 UCLA L. REV. 519 (2001) (discussing how work has eclipsed other primary factors in defining social identity); Kohler, *supra* note 32, at 108 ("[O]ne's life takes on publicly intelligible meaning largely through participation in market labor. The job not only constitutes one's chief claim to wealth, but is also the prime determinant of one's status."); Wilborn, *supra* note 19, at 835 (noting that people often define themselves by occupations); cf. Estlund, *supra* note 24, at 3 ("[T]he workplace is the single most important site of cooperative interaction and sociability among adult citizens outside the family.").

³⁸ See *infra* notes 235-39 and accompanying text.

³⁹ Cf. Anita Bernstein, *How to Make a New Tort: Three Paradoxes*, 75 TEX. L. REV. 1539, 1547 & 1565 (1997) ("The measured, respectful movement of a new tort will always appear feeble to activists . . .").

problems presented and works them out individually. Finally, common law development does not provide a hard target for opponents of employment law. By the time the target solidifies, opponents may be willing to support employment statutes, which *then* may be viewed as preferable to the common law.

Part II of this Article discusses the emerging workplace issues of electronic invasion of privacy, genetic discrimination, and bullying. It considers both the inadequacies of existing law and proposals for change. Part III discusses the current collage that is the employment law of the United States. It traces the law's development and considers how various methods of regulation have been used at various times. Part IV expresses some specific reservations about using legislation to address these emerging workplace problems. Finally, Part V discusses changes that courts must make in tort theories so that they can adequately address these particular issues.

II. ELECTRONIC PRIVACY INVADERS, GENETIC DISCRIMINATORS, AND BULLIES: THE QUEST FOR LEGAL SOLUTIONS

Invasions of privacy, genetic discrimination, and general harassment are all manifestations of disrespect and incivility in the workplace. Many believe that rampant disrespect in the workplace inflicts deleterious consequences on both employees and employers.⁴⁰ Workplace abuse causes employees considerable distress.⁴¹ Likewise, electronic monitoring of employees seriously affects both their mental and physical health.⁴² Additionally, humiliation imposes substantial costs on employers in terms of lost work time, decreased productivity,

⁴⁰ See, e.g., Kesan, *supra* note 19, at 320; Yamada, *supra* note 16, at 483-84.

⁴¹ See, e.g., *Attitudes in the Workplace VII: The Seventh Annual Labor Day Survey* (Harris Interactive 2001) (reporting that more than 35% of workers surveyed said that their jobs are harming their physical or mental health, and 42% said job pressures were interfering with their personal relationships); *Survey Shows Growing Job Malaise Despite Boom Times in U.S. Labor Market*, DAILY LAB. REP. (BNA), Oct. 17, 2000 (No. 201), at A7. But see *Review of Survey Data Finds Little Change in Job Satisfaction Levels Over Half Century*, DAILY LAB. REP. (BNA), Aug. 28, 2001 (No. 166), at A5 (reporting findings of American Enterprise Institute for Public Policy Research based on survey that most Americans are satisfied with their jobs, and the level of satisfaction has remained relatively constant for more than fifty years). Legal commentators and others have written on the harm that workplace humiliation causes employees. See sources cited *supra* note 16.

⁴² Wilborn, *supra* note 19, at 838 nn.47-48 (citing studies).

poor morale and loss of employees.⁴³ Even the "epidemic" of workplace violence⁴⁴ relates to workplace incivility.⁴⁵

Privacy invaders and bullies are the current hobgoblins in the employment world. That is not to say that discriminators, the workplace demons of the last century, have been exorcized. However, a significant segment of society believes that forty years of powerful legal intervention has abated virulent workplace discrimination against African Americans, women, and others. Now, some attention has shifted to status-neutral (color-blind, sex-blind, etc.) initiatives to make the workplace more civil for all workers, a place where the relatively powerful do not bully, invade the privacy of, and otherwise inflict dignitary harms on the relatively powerless.⁴⁶ Concurrently, attention has shifted away from regulating abusive discharges to regulating the terms and conditions during employment.⁴⁷

A. *Privacy Invasion: Electronic Invaders and Genetic Discriminators*

1. Definitions and Examples

Invasion of privacy may be the dominant employment issue of our time.⁴⁸ Although often discussed, privacy is a hard concept to define.⁴⁹ It has been described as "a value asserted by individuals against the demands of a curious and intrusive society."⁵⁰ Privacy has to do with an individual's autonomy and

⁴³ See, e.g., Yamada, *supra* note 16, at 483-84.

⁴⁴ *ILO Cites Worldwide Epidemic, Urges Global Response to Violence at Work*, DAILY LAB. REP. (BNA), July 20, 1998, at A5.

⁴⁵ See Yamada, *supra* note 16, at 483. A legislative panel in Massachusetts studying workplace violence, the Massachusetts Joint Committee on Public Safety, recommended that employers adopt "zero tolerance policies" on workplace violence, threats, harassment, and bullying. See *Massachusetts Panel Seeks Zero Tolerance, Humane Policies to Reduce Violence at Work*, DAILY LAB. REP. (BNA), July 25, 2001 (No. 142), at A3. There are two relationships between workplace violence and workplace incivility: first, workplace violence may be the most severe form of incivility; and second, workplace violence may be perpetrated by victims of workplace harassment and bullying.

⁴⁶ See *infra* Part II.B.3.

⁴⁷ See *infra* Part III.C.

⁴⁸ See, e.g., Kesan, *supra* note 19, at 292.

⁴⁹ Wilborn, *supra* note 19, at 832; Kesan, *supra* note 19, at 306; Kim, *supra* note 17, at 683-87; Makdisi, *supra* note 20, at 979-80.

⁵⁰ Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 958 (1989).

interest in guarding a realm of intimacy around her inner person or her identity.⁵¹ There may be no more succinct and pragmatically useful definitions than “the right to one’s person”⁵² and the “right to be let alone.”⁵³ Both electronic monitoring and genetic testing and discrimination⁵⁴ threaten employees’ autonomy regarding personal information.

Notwithstanding definitional problems, most Americans would agree that privacy is a fundamental and cherished right.⁵⁵ Still, Americans recognize, at least in some contexts, that their privacy rights are not absolute. Those rights must be balanced against competing societal interests, and in some cases the balance will be struck in favor of invasions of varying types and degrees. This recognition was no more evident than in the aftermath of the tragedies of September 11, 2001, when Americans quickly acknowledged, although regretfully, that to some extent privacy rights must yield to security interests.⁵⁶ Similarly, the common law tort of invasion of privacy recognizes both that privacy must be balanced with other important policies,⁵⁷ and that privacy is alienable.⁵⁸ Professor Robert Post has eloquently described the delicacy of the American right to privacy: “That fragility [of privacy norms in modern life] stems not merely from our ravenous appetite for the management of our social environment, but from the undeniable prerogatives of public accountability.”⁵⁹

Employers invade workplace privacy in many ways and use different devices, including paper-and-pencil examinations, video cameras, tape recorders, medical examinations and tests, and computers. Employers have diverse interests in so doing. An employer may seek to prevent the following: computer

⁵¹ Warren & Brandeis, *supra* note 17, at 197; Kim, *supra* note 20, at 1501; Post, *supra* note 50, at 958; Wilborn, *supra* note 19, at 832-33.

⁵² Makdisi, *supra* note 20, at 980-81 (quoting THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 29 (2d ed. 1888)); see also Warren & Brandeis, *supra* note 17, at 207.

⁵³ Makdisi, *supra* note 20, at 980-81 (citing COOLEY, *supra* note 52, at 29).

⁵⁴ Kim, *supra* note 20, at 1501, 1535.

⁵⁵ Wilborn, *supra* note 19, at 831.

⁵⁶ See, e.g., Shaun B. Spencer, *Reasonable Expectations and the Erosion of Privacy*, 39 SAN DIEGO L. REV. 843, 912 (2002) (“[T]he shocking September 11 terrorist attacks threaten to skew the already tenuous balance between privacy and security in favor of the latter.”); *Layoffs and Privacy*, 18 INDIVIDUAL EMP. RTS. (BNA) 4 (2001) (discussing how concerns of national security are eroding privacy).

⁵⁷ Kesan, *supra* note 19, at 303.

⁵⁸ *Id.* at 306.

⁵⁹ Post, *supra* note 50, at 1010.

crime; dissemination of trade secrets and confidential information to competitors; use of work time for personal activities and pursuits; and risky employee conduct that may result in imposition of liability on the employer for sexual harassment, defamation, or computer crime. Employers also have an interest in hiring and promoting employees who are physically and mentally fit for particular jobs.⁶⁰

The privacy right of employees is hard to articulate in the abstract. It is the right to be left alone, but almost everyone would admit that the right, never absolute to begin with, certainly is further circumscribed by the workplace and the employer's interests. Still, employee rights advocates insist that employees have a right of privacy that restricts an employer from knowing too much about them, controlling them too closely or emotionally hurting them.⁶¹ The following two subparts more particularly describe two types of invasion of privacy, electronic monitoring and genetic discrimination, respectively.

a. Electronic Monitoring

The most high-profile workplace privacy issue of the day is electronic monitoring of employee communications and activities. It is one of the most prevalent monitoring or surveillance techniques, permitting a level of "observation" not possible through other means⁶² and causing considerable

⁶⁰ Regarding electronic monitoring, see Kesan, *supra* note 19, at 310-15 (discussing employers' reasons for conducting electronic monitoring of employees); Watson, *supra* note 19, at 101 (same); Richman, *supra* note 19 (discussing employers' need to monitor to attempt to avoid liability for sexual harassment, negligent hiring, and negligent retention in cases of workplace violence). For discussion of potential employer liability for the computer crimes of employees, see generally Mark Ishman, Comment, *Computer Crimes and the Respondeat Superior Doctrine: Employers Beware*, 6 B.U. J. SCI. & TECH. L. 6 (2000).

Regarding genetic testing, see Kim, *supra* note 20, at 1539-42; Feldman & Katz, *supra* note 20, at 396-97 (discussing reasons for employers to conduct genetic testing of employees and to take employment actions based on test results).

⁶¹ Professor Kim cites the following as core areas of privacy: one's body and bodily functions; personal information relating to health and sexual matters; one's home; and traditionally private communications. See Kim, *supra* note 17, at 700-01.

⁶² Kesan, *supra* note 19, at 305; see also Frayer, *supra* note 19, at 858-59 (discussing Silentwatch by Adai, Inc., a software package that permits monitoring that is surprising in both its breadth and depth). Clearswift's MIMESweeper software line includes MIMESweeper, which audits individual Web traffic and warns offenders who access inappropriate sites or view/receive inappropriate e-mail content. See http://www.mimesweeper.com/products/msw/msw_web/default.asp (last visited Aug. 9, 2003). SpectorSoft touts its Spector Pro software package with, "When you Absolutely

distress among employees.⁶³ Furthermore, electronic monitoring is an area where technology has outstripped the law, leaving employees largely unprotected.⁶⁴ Some types of electronic monitoring garnering the most attention are simultaneous monitoring of computers, such as keystroke monitoring, retrieval of e-mail messages and stored computer files, and mapping of Internet sites visited by employees. The 2001 survey by the American Management Association showed that at least two-thirds of major U.S. firms engage in electronic monitoring. That number has doubled in the last five years.⁶⁵

Ironically, when employees claim their employer has injured their dignity by electronic monitoring, employers sometimes respond that they are promoting civility and protecting the dignity of other employees. Thus, one person's invasive, disrespectful act is another's attempt to enforce respect. For example, in May 2000, Dow Chemical performed an e-mail audit at its Freeport, Texas plant and found that 254 out of 5,500 employees had saved, filed, or sent sexual or otherwise inappropriate e-mail.⁶⁶ Dow fired twenty employees, arguing that it was attempting to prevent sexual harassment and had developed policies to promote respect and responsibility.⁶⁷

There are of course many other illustrative stories and lawsuits regarding electronic monitoring in the workplace. Consider the case of the insurance company executive fired just three days before his shares of stock, worth millions, were to vest. His employer said it fired him because he repeatedly accessed pornographic sites on the Internet while he was at work.⁶⁸ The executive contended that he did not intentionally

need to know Everything they are doing online." <http://www.spectrosoft.com> (last visited Aug. 13, 2002). Including eBlaster 3.0 (for e-mail) and Spector (for computer screen snapshots), the package offers "snapshot recording, Email recording, Chat/Instant Message logs and sophisticated Keystroke journals." *Id.*

⁶³ Wilborn, *supra* note 19, at 838.

⁶⁴ Kesan, *supra* note 19, at 304-05; Patrick Boyd, Note, *Tipping the Balance of Power: Employer Intrusion on Employee Privacy Through Technological Innovation*, 14 ST. JOHN'S J. LEGAL COMMENT. 181, 182 (1999) ("Technological innovation . . . now permits employers to compromise their employees by violating their right to privacy in a way not anticipated by earlier laws.").

⁶⁵ Am. Mgmt. Ass'n, 2001 Survey: *Workplace Monitoring & Surveillance: Policies and Practices*, *supra* note 19.

⁶⁶ Panel Orders Dow Chemical to Reinstate a Dozen Workers Fired for E-Mail Abuse, DAILY LAB. REP. (BNA), Apr. 16, 2002 (No. 73), at A2.

⁶⁷ *Id.* An arbitration panel ordered reinstatement of twelve of the discharged employees because of disparate enforcement of the policy by Dow.

⁶⁸ TBG Ins. Servs. Corp. v. Sup. Ct., 117 Cal. Rptr. 2d 155 (Cal. Ct. App.

access the sites, but they simply “popped up” on his computer. He sued the employer for wrongful termination, arguing that the employer’s stated reason was pretextual.⁶⁹

The employer had provided him two computers, one to keep at work and one to keep at home. During discovery, the employer demanded production of the home computer with no deletions or alterations of any information stored on the hard drive. The plaintiff resisted, contending in part that he had a state constitutional right of privacy in the information stored on the computer’s hard drive. Unfortunately for the plaintiff, he had signed the company’s “electronic and telephone equipment policy statement.”⁷⁰ The court held that he had no reasonable expectation of privacy in light of his voluntary waiver.⁷¹ The court also discussed that under the “community norms” of “21st Century computer-dependent businesses,” major employers monitor, record, and review employee communications and activities.⁷² The case demonstrates that even when employers monitor to protect a legitimate interest, the results of the monitoring can be used as a pretext for an illegitimate or bad reason for an adverse employment action.⁷³

b. Genetic Discrimination

A second privacy issue is genetic testing⁷⁴ of employees, and adverse employment actions based on the information obtained from those tests.⁷⁵ Like electronic monitoring, genetic discrimination⁷⁶ has become possible in the workplace because

2002).

⁶⁹ *Id.* at 158.

⁷⁰ Under the policy, he agreed not to use the systems for personal or noncompany purposes unless expressly approved, and not to use them for “improper, derogatory, defamatory, obscene or other inappropriate purposes.” *Id.* at 157.

⁷¹ *Id.* at 164.

⁷² *Id.* at 161-62.

⁷³ Kesan, *supra* note 19, at 320 (“Abuse may also take the form of voyeurism, union-busting, ferreting out whistleblowers, and creating pretenses to fire members of protected employee groups.”).

⁷⁴ “Genetic testing” and “genetic information” do not have uniformly accepted meanings in the language of the genetic sciences. Feldman & Katz, *supra* note 20, at 410 nn.188-89. Most enacted and proposed statutes and policies include definitions. Commentators have distinguished between genetic screening, a one-time test to determine whether one has a genetic predisposition or disease, and genetic monitoring, involving periodic tests to increase workplace safety and protect the health of employees. *Id.* at 395-96.

⁷⁵ See generally Feldman & Katz, *supra* note 20.

⁷⁶ Professor Kim argues that a privacy rights model offers a better framework for addressing genetic discrimination than the anti-discrimination model. Kim, *supra*

of advances in science and technology. It also has been the subject of proposed legislation at the federal and state levels.⁷⁷ It has not been as pervasive as electronic monitoring because it is not as cheap and easily available as computer monitoring, and its reliability is still suspect.⁷⁸ However, the financial incentives to make genetic testing more broadly available suggest that this type of privacy invasion will increase.⁷⁹

As a general matter, employers' use of tests to invade the privacy of employees is not new.⁸⁰ In 1988, Congress all but banned the use of polygraphs by employers in the Employee Polygraph Protection Act.⁸¹ Likewise, drug tests are often challenged under federal⁸² and state constitutions, state drug testing laws, and common law tort theories.⁸³ Through statutes and common law, some states have restricted the use of paper-and-pencil tests and other types of honesty and psychological profile tests.⁸⁴ However, genetic testing is a uniquely powerful issue that poses special challenges because of the depth of the invasion, which reaches into the secrets of one's biological makeup, and because of the breadth of information that genetic testing can provide.

The Human Genome Project began in 1990, and within ten years the once unthinkable had been accomplished – the "genetic map" was essentially complete.⁸⁵ Now it is possible to use a piece of hair, a drop of blood or other sliver of genetic material to obtain extensive genetic information about a person.⁸⁶ Many good results are likely to flow from this scientific marvel, as scientists may be able to identify potential diseases and conditions,⁸⁷ and someday perhaps even work with

note 20, at 1502.

⁷⁷ See *infra* Part II.A.3.b.

⁷⁸ Feldman & Katz, *supra* note 20, at 389 & n.3; Kim, *supra* note 20, at 1511.

⁷⁹ Makdisi, *supra* note 20, at 972; Miller, *supra* note 20, at 235-37.

⁸⁰ Wukitsch, *supra* note 20, at 42-43.

⁸¹ 29 U.S.C. §§ 2001-2009 (2000). Although the Act provides for circumstances under which employers can polygraph employees, the requirements are so stringent as to make the provisions virtually useless.

⁸² See, e.g., *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

⁸³ See, e.g., *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123 (Ala. 1989).

⁸⁴ See generally David C. Yamada, *The Regulation of Pre-Employment Honesty Testing: Striking a Temporary (?) Balance Between Self-Regulation and Prohibition*, 39 WAYNE L. REV. 1549 (1993).

⁸⁵ Kim, *supra* note 20, at 1497; Makdisi, *supra* note 20, at 965-66.

⁸⁶ Makdisi, *supra* note 20, at 965-66.

⁸⁷ See, e.g., Miller, *supra* note 20, at 226.

those genes to treat or prevent a disease. However, some bad results may also follow. Employers can and have used new technology to obtain genetic information about employees.⁸⁸ There are many reasons why employers may want to perform tests and obtain genetic information.⁸⁹ Some are completely benign, such as complying with the Occupational Health and Safety Act, and identifying employees whose health or safety may be endangered, or who may endanger the health or safety of others by working in particular jobs or environments.⁹⁰ Yet other reasons strike at the heart of employees' fears: making hiring, firing, promotion, demotion, and other employment decisions based on the information.⁹¹

Specifically, employers would be inclined to take adverse employment actions, such as refusing to hire, firing, or denying health care coverage to individuals who tested positive for certain genes that predisposed one to disease. Incentives abound for employers to cull and use genetic information, such as lowering the costs of health care, workers' compensation costs, lost time under the Family and Medical Leave Act, accommodations under the American with Disabilities Act, and training expenses and other investments in employees with little longevity.⁹² The incentives are not merely theoretical – there is evidence that such employment discrimination has in fact occurred.⁹³ Quite apart from the invasion of privacy and its impact on adverse employment decisions, but equally disconcerting, genetic discrimination also has a side effect that undercuts employee health. Survey evidence indicates that employees fear such employment discrimination and would refuse testing based on those fears, thus foregoing the potential benefits of preventing or decreasing the chance of developing diseases.⁹⁴

⁸⁸ See Feldman & Katz, *supra* note 20, at 393 (explaining that the following three conditions can be determined from genetic testing: (i) person has genetic defect that has caused or will cause a disease; (ii) person is a carrier of disease or genetic defect; and (iii) person has predisposition to developing a disease).

⁸⁹ See, e.g., Kim, *supra* note 20, at 1539-42.

⁹⁰ See Feldman & Katz, *supra* note 20, at 396-97; Kim, *supra* note 20, at 1539-42.

⁹¹ See Feldman & Katz, *supra* note 20, at 397.

⁹² *Id.* at 397-98 (citing some of these reasons).

⁹³ Miller, *supra* note 20, at 237 (citing survey of genetic services providers and primary health care physicians who reported knowing 582 people who were denied employment or insurance coverage because of their genetic predispositions).

⁹⁴ Kim, *supra* note 20, at 1542-43; Miller, *supra* note 20, at 233; Wukitsch,

In the most notorious reported incident of alleged genetic testing of employees, a group of thirty-six railway workers employed by Burlington Northern Santa Fe Railway filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging that their employer had genetically tested them without their consent or knowledge.⁹⁵ The employees claimed to have reported to their employer that they suffered from carpal tunnel syndrome. In turn, the employer required them to submit to a medical examination by non-company health care providers. Instead of being limited to an examination for carpal tunnel syndrome, the examination included a blood test for genetic markers. Consequently, the EEOC filed suit under the Americans with Disabilities Act.⁹⁶ The EEOC and the employer ultimately settled the case, with the employer denying that it had engaged in illegal testing and agreeing to pay 2.2 million dollars. Prior to settling, the company agreed to stop genetic testing.⁹⁷

2. Protecting Privacy: Inadequacy of Current Law

One may view the law protecting employee privacy as consisting of “bits and pieces of legislation and of a mélange of common law categories – rife with silences, doctrinal gaps, and inconsistencies . . . in other words, a mess.”⁹⁸ That assessment stems from the comparative lack of governing principles, such as those found in German law.⁹⁹ The following two subparts survey and critique the capacity of extant law to effectively meet the challenges posed by electronic monitoring and genetic testing.

supra note 20, at 40; Feldman & Katz, *supra* note 20, at 395 & n.56; Hughes, *supra* note 20, at 36-37.

⁹⁵ *EEOC's First Genetic Testing Challenge*, *supra* note 20; Molly McDonough, *EEOC Reaches \$2.2 Million Settlement with Railroad*, 21 ABA J. E-REP. 1 (2002).

⁹⁶ *EEOC v. Burlington N. and Santa Fe Ry. Co.*, No. 02-C-0456 (N.D. Iowa).

⁹⁷ Press Release, U.S. Equal Employment Opportunity Commission, *EEOC and BNSF Settle Genetic Testing Case Under Americans with Disabilities Act* (May 8, 2002), available at <http://www.eeoc.gov/press/5-8-02.html>; see also McDonough, *supra* note 95.

⁹⁸ FINKIN, *supra* note 17, at xxi.

⁹⁹ *Id.* at xx & n.10 (citing sources). The Basic Law of the Federal Republic of Germany states that the “secrecy of post and telecommunication are inviolable.” THE BASIC LAW (GRUNDGESETZ): THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY art. 10(1) (Axel Tschentscher trans., 2003). For a brief summary of German law on workplace privacy, see Kesan, *supra* note 19, at 309-10.

a. Electronic Monitoring

Currently, both federal and state laws regulate electronic monitoring of employees. As an important initial division, public employees enjoy protection beyond their private counterparts because public employees have privacy protections in both the federal and state constitutions.¹⁰⁰ In only a single state – California – does the state constitutional right of privacy extend to private sector employees.¹⁰¹ Additionally, statutory protection is provided by the Electronic Communications Privacy Act of 1986 (ECPA),¹⁰² which amended Title III of the Omnibus Crime Control and Safe Streets Act of 1968,¹⁰³ also known as the Federal Wiretap Act.

At the state level, many state statutes more or less track the ECPA. However, at the time the ECPA was enacted, Internet and e-mail monitoring were not major issues. Generally, Title I of the Act¹⁰⁴ prohibits the interception of wire, oral, and electronic communications, while Title II¹⁰⁵ prohibits accessing stored communications. As promising as those brief descriptions sound for employees, for many reasons the ECPA has proven largely ineffective in addressing the current issues in computer and electronic monitoring.¹⁰⁶ Because the state statutes are modeled on the federal law, most share the federal

¹⁰⁰ Wilborn, *supra* note 19, at 866-73; Kesan, *supra* note 19, at 294-95; Kim, *supra* note 17, at 703-06.

¹⁰¹ Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633 (Cal. 1994); *see also* Kesan, *supra* note 19, at 294 (stating that "California is the only state granting constitutional privacy rights to private sector workers").

¹⁰² Pub. L. No. 99-508, 100 Stat. 1848 (1986) (codified as amended in scattered sections of 18 U.S.C.).

¹⁰³ Pub. L. No. 90-351, 82 Stat. 197, 211-25 (1968) (codified as amended at 18 U.S.C., §§ 2510-2522 and 47 U.S.C. § 605 (2000)).

¹⁰⁴ 18 U.S.C. §§ 2510-2521 (2000).

¹⁰⁵ 18 U.S.C. §§ 2701-2711 (2000).

¹⁰⁶ Kesan, *supra* note 19, at 295-99; Wilborn, *supra* note 19, at 839-41; Robinson, *supra* note 19, at 313-20; Richman, *supra* note 19, at 1349-50; Watson, *supra* note 19, at 87-88. One obstacle about which there has been some litigation is whether the monitoring of e-mails constitutes an "interception" within the meaning of the ECPA. *See* Robinson, *supra* note 19, at 314-16. The determinative factor may be whether the e-mail is in transit or in storage. *Id.* at 315. *See also* Frayer, *supra* note 19, at 866-67 (discussing the few judicial interpretations of "intercept"). Even if a plaintiff is able to establish an interception under a court's interpretation of the term, however, there are several exceptions that pose formidable hurdles. *See, e.g.,* Kesan, *supra* note 19, at 296-98; Robinson, *supra* note 19, at 316-18. *But see* Smith v. Devers, 01-T-551-N, 2002 WL 75803 (M.D. Ala. Jan. 17, 2002) (reversing summary judgment in favor of the defendant employer on a Federal Wiretap Act claim).

statute's limitations regarding protection against computer monitoring.¹⁰⁷

Although often overlooked in debates about computer monitoring, one federal statute that may provide some protection is the National Labor Relations Act (NLRA).¹⁰⁸ Most obviously, it is an unfair labor practice to conduct surveillance of union activities in a workplace where employees are represented by a union, or where union organizing is being conducted.¹⁰⁹ Thus, if an employer is conducting general monitoring, and employees are discussing union organizing or other union activities, the employer may have committed an unfair labor practice in violation of § 8(a)(1) of the NLRA.¹¹⁰

The lesser-known aspect of the NLRA is that all employees, whether represented by a union or not, with the exceptions specifically enumerated in the Act, have the right under § 7¹¹¹ to engage in concerted activities for purposes of collective bargaining or mutual aid or protection. "For purposes of mutual aid or protection" has been interpreted broadly to include most matters relating to terms or conditions of employment.¹¹² Thus, monitoring of employees who are discussing work conditions via e-mail may be an unfair labor practice. Establishing rules prohibiting such communications also may constitute an unfair labor practice.¹¹³

Turning to common law, the tort of invasion of privacy also applies to computer monitoring.¹¹⁴ There are four branches or versions of the tort: intrusion upon seclusion; public disclosure of private facts; false light; and appropriation of name or likeness.¹¹⁵ The branch relevant in the employment

¹⁰⁷ Richman, *supra* note 19, at 1350-52. Connecticut is an exception, as it enacted a law that requires employers to give employees prior written notification of electronic monitoring. CONN. GEN. STAT. ANN. § 31-48d(b)(1) (West 2000).

¹⁰⁸ 29 U.S.C. §§ 151-169 (2000). Regarding applicability of the NLRA to electronic invasions of privacy, see William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old Is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259 (2002); Frayer, *supra* note 19, at 862-64.

¹⁰⁹ 1 THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 127 (Patrick Hardin ed., 3d ed. 1992).

¹¹⁰ 29 U.S.C. § 158(a)(1) (2000).

¹¹¹ 29 U.S.C. § 157 (2000).

¹¹² See Corbett, *supra* note 108, at 282-83.

¹¹³ *Id.* at 291-95.

¹¹⁴ Kesan, *supra* note 19, at 302-04; Kim, *supra* note 17, at 688-98.

¹¹⁵ Kesan, *supra* note 19, at 302-04; Kim, *supra* note 17, at 688-98; RESTATEMENT (SECOND) OF TORTS § 652A (1977); HENRY H. PERRITT, JR., WORKPLACE TORTS: RIGHTS & LIABILITIES 198 (1991).

context is intrusion upon seclusion.¹¹⁶ The tort's three *prima facie* elements are: (1) an intentional invasion or intrusion; (2) that is highly offensive to a reasonable person; (3) occurring where there is a reasonable expectation of privacy.¹¹⁷ On the whole, employees suing their employers for the tort of intrusion upon seclusion have fared about as poorly as employees suing their employers for intentional infliction of emotional distress (IIED).¹¹⁸

The weak track record exists for two reasons. First, the requirement that the intrusion be highly offensive to a reasonable person prevents trivial privacy invasions from being actionable.¹¹⁹ This element is roughly analogous to the outrage element in intentional infliction of emotional distress. It seems, however, that courts have not set the bar as high for "highly offensive" as they have for "outrageous." An intrusion must be highly offensive to a reasonable person, whereas for outrage to be satisfied, the act must be such that civilized society should not tolerate it. Plaintiffs often plead both IIED and invasion of privacy when complaining of abuse in the workplace. However, the outrage element is too difficult to satisfy when the act complained of is electronic monitoring.¹²⁰

Most invasion of privacy claims in the employment context fail because courts find either that there is no reasonable expectation of privacy, or that the invasion would not be highly offensive to a reasonable person, or both.¹²¹ Attorneys and consultants routinely advise employers to establish written e-mail and computer use policies, to tell employees that they can and will be monitored,¹²² and to have

¹¹⁶ Kesan, *supra* note 19, at 302; Kim, *supra* note 17, at 688. Professor Makdisi describes the intrusion upon seclusion branch as being more aligned with dignitary insult, whereas the other three are aligned with property-like alienation issues. Makdisi, *supra* note 20, at 983.

¹¹⁷ 2 DAN B. DOBBS, *THE LAW OF TORTS* § 426, at 1200 (2001).

¹¹⁸ See generally Kim, *supra* note 17.

¹¹⁹ See PERRITT, *supra* note 115, at 204-05; Kim, *supra* note 17, at 691-92; Kesan, *supra* note 19, at 302-03.

¹²⁰ Kesan, *supra* note 19, at 302; see also Smith v. Devers, 01-T-551-N, 2002 WL 75803 (M.D. Ala. Jan. 17, 2002) (reversing summary judgment in favor of the defendant employer on invasion of privacy claim, but affirming on IIED claim).

¹²¹ The line between the two elements is indistinct, and courts often blend them into one in their analysis. Kesan, *supra* note 19, at 302; see also PERRITT, *supra* note 115, at 203-04.

¹²² See, e.g., Spencer, *supra* note 56, at 870 (Lawyers "routinely advise their clients to deny employees any expectation of privacy."); *Focus On . . . Employee Privacy*, INDIVIDUAL EMPL. RIGHTS (BNA), Aug. 6, 2002 (No. 18), at 72 (discussing

employees sign an acknowledgment regarding the policy.¹²³ Nevertheless, even without such policies, courts often find that the employees cannot have a reasonable expectation of much privacy in the workplace.¹²⁴ Perhaps the most extreme example is in *Smyth v. Pillsbury Co.*,¹²⁵ in which the court rejected the plaintiff's privacy expectation even though the employer had assured employees that it would not monitor e-mail and use information obtained to discipline or fire employees.¹²⁶ Moreover, even if courts conclude that an employee has or may have a reasonable expectation of privacy, they still may hold that the intrusion is not highly offensive because the employer's interests outweigh the employee's privacy rights.¹²⁷

A second problem with the intrusion tort is the Catch-22 that occurs when employers attempt to invade a zone of privacy. If the employee blocks the invasion, then the employee often is fired and cannot successfully sue because no privacy invasion occurred.¹²⁸ Alternatively, if the employee permits the intrusion to occur, a claim for invasion of privacy often fails on the rationale that the employee consented to the intrusion.¹²⁹

Commentators generally have concluded that existing law is inadequate to address abusive electronic monitoring in the workplace. One scholar summarized his review of the federal and state law by saying that law in the United States

attorney/speaker's advice to human resource managers to fashion and communicate a clear policy that "reserv[es] the right to search and destroy any reasonable expectation of privacy"). See also *Garrity v. John Hancock Mut. Life Ins. Co.*, 2002 WL 974676 (D. Mass. May 7, 2002).

¹²³ Kesan, *supra* note 19, at 304-05 ("At common law, then, an employer may insulate itself from liability by informing employees of a monitoring program.").

¹²⁴ *Id.* at 305; Wilborn, *supra* note 19, at 846 ("For example, an employee's office, desk, or locker may be held to be the employer's property and thus, not private."). See also Makdisi, *supra* note 20, at 998-1002 (writing about application of intrusion upon solitude to genetic testing and recommending abrogation of a mechanical application of the "public places rule"— courts grant summary judgment in cases in which the alleged intrusion occurred in a public place, on the rationale that there can be no expectation of privacy in a public place).

¹²⁵ 914 F. Supp. 97 (E.D. Pa. 1996).

¹²⁶ *Id.* at 101 ("[W]e do not find a reasonable expectation of privacy in e-mail communications voluntarily made by an employee to his supervisor over the company e-mail system notwithstanding any assurances that such communications would not be intercepted by management.").

¹²⁷ See, e.g., *Garrity*, 2002 WL 974676, at *2. ("Even if plaintiffs have a reasonable expectation of privacy in their work e-mail, defendant's legitimate business interest in protecting its employees from harassment in the workplace would likely trump plaintiffs' privacy interests.").

¹²⁸ See, e.g., *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123 (Alaska 1989); Kim, *supra* note 17, at 675-76.

¹²⁹ See, e.g., *Luedtke*, 768 P.2d 1123; Kim, *supra* note 17, at 676.

does not protect "a zone of privacy in the workplace."¹³⁰ Although that conclusion seems too severe, if he means there is no absolute right of privacy that will prevail regardless of the interests the employer throws onto the scales, then it is certainly true that the zone is minuscule. Indeed, the legal approach in the United States has been to individually address each method or device used to invade privacy rather than trying to protect a zone of privacy against invasion by all means or devices.¹³¹ The only general source of privacy protection for most employees in the private sector is the common law.¹³²

b. Genetic Discrimination

As with electronic monitoring and other privacy issues, public employees can state claims for invasion of privacy under the Constitution, although the Supreme Court has not yet decided a case involving an individual's privacy interest in her genetic information.¹³³ There is no federal legislation that explicitly prohibits genetic testing of employees or discrimination against them on the basis of information obtained by such testing.¹³⁴ There is a federal statute, the Health Insurance Portability and Accountability Act (HIPAA),¹³⁵ which generally prohibits group health insurance plans from using genetic information to make rules regarding initial eligibility or continued eligibility for coverage.¹³⁶ However, while relevant to the employment setting because most employees have health coverage through their employers,¹³⁷ HIPAA does not prohibit employers from requesting or requiring employees to submit to genetic testing, or from discriminating in employment on the basis of genetic information.

Also at the federal level, President Clinton issued Executive Order Number 13,145, entitled "To Prohibit

¹³⁰ Kesan, *supra* note 19, at 322.

¹³¹ Kim, *supra* note 17, at 674.

¹³² *Id.* at 675.

¹³³ Miller, *supra* note 20, at 251-52.

¹³⁴ *Id.* at 237.

¹³⁵ Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified as amended in scattered sections of 18 U.S.C., 26 U.S.C., 29 U.S.C., and 42 U.S.C.).

¹³⁶ Miller, *supra* note 20, at 255; Feldman & Katz, *supra* note 20, at 406-07.

¹³⁷ See Kim, *supra* note 20, at 1502.

Discrimination in Federal Employment Based on Genetic Information.”¹³⁸ The Executive Order prohibits discrimination based on protected genetic information in all civilian federal government employment.¹³⁹ The Equal Employment Opportunity Commission (EEOC) also has interpreted the Americans with Disabilities Act (ADA) to prohibit genetic discrimination.¹⁴⁰ As recounted above, the EEOC has settled the one case in which it filed suit for genetic discrimination under the ADA.¹⁴¹ The crux of the EEOC interpretation is that genetic defects and predisposition to diseases or conditions can be covered under the “regarded as” prong of the definition of “disability.”¹⁴² Whether courts will defer to the EEOC’s interpretation of the ADA remains to be seen.¹⁴³ Title VII may also be invoked in a case of genetic discrimination if a case can be made under the disparate impact theory, but that depends on establishing a high correlation between the incidence of a particular genetic marker or predisposition, and a protected class under Title VII.¹⁴⁴

At the state level, thirty-one states have enacted one or more statutes addressing genetic testing and its uses in the workplace.¹⁴⁵ There is a wide variety among the statutes in the extent to which they restrict employers from requesting or requiring genetic testing and using such information to make employment decisions.¹⁴⁶

As with electronic monitoring, the tort theory of invasion of privacy may also be applied to genetic testing. Although there are no reported decisions of this type, the theory has been applied to drug and other types of testing, and

¹³⁸ Exec. Order No. 13,145, 65 Fed. Reg. 6,877 (Feb. 8, 2000).

¹³⁹ Miller, *supra* note 20, at 249.

¹⁴⁰ *Id.* at 238-47 (citing 2 U.S. EEOC, COMPLIANCE MANUAL, Order 915.002, at 902-45 (1995)).

¹⁴¹ See *supra* notes 95-97 and accompanying text.

¹⁴² Miller, *supra* note 20, at 238-47; Kim, *supra* note 20, at 1514.

¹⁴³ Miller, *supra* note 20, at 241 (stating that “the EEOC’s Interpretive Guidance can be used as persuasive authority” but “the guidance does not have the same force of law as a federal statute or regulation”).

¹⁴⁴ Kim, *supra* note 20, at 1513; Miller, *supra* note 20, at 247-48; Feldman & Katz, *supra* note 20, at 404-05.

¹⁴⁵ See Nat’l Human Genome Res. Inst., Report on Employment Discrimination State Legislation, at http://www.nhgri.nih.gov/Policy_and_public_affairs/Legislation/workplace.htm (last visited Aug. 3, 2003) [hereinafter NHGRI Website].

¹⁴⁶ See, e.g., Miller, *supra* note 20, at 259-63 (surveying state legislation); Feldman & Katz, *supra* note 20, at 410-16 (same).

should fare at least as well with genetic testing.¹⁴⁷ Indeed, at least one commentator's survey of the intrusion upon seclusion cases imbues her with optimism regarding the flexibility of the intrusion tort and its application to genetic testing.¹⁴⁸ Another, while not specifically calling for a common law tort response, argues that genetic discrimination should be treated as an issue of protecting employee privacy.¹⁴⁹

In sum, there is existing statutory and common law that applies to both of these emerging types of workplace privacy invasion. On balance, however, many commentators deem this law inadequate to address the problems. With respect to statutes, only the recently enacted state statutes on genetic testing and discrimination expressly refer to one of these types of invasions. For all of the other statutes, courts may interpret them as applicable to these invasions or they may not.

As for the tort theories, principally invasion of privacy, the inadequacy stems from courts generally favoring employers' interests over employees' privacy interests, and consequently skewing the tort doctrine and analysis in favor of employers. Given the dearth of protection afforded employees by existing law in the face of scientific and technological developments that can penetrate deeply into areas of employee privacy, it was predictable that commentators and employee rights advocates would propose new law. Given the history of employment law in this country, it also is not surprising that most have favored new legislation rather than adjustments to existing common law.

¹⁴⁷ Makdisi, *supra* note 20, at 1002-12. Although not an employment case, the application of the invasion of privacy tort to clandestine genetic testing arose in *Doe v. High-Tech Inst., Inc.*, 972 P.2d 1060 (Colo. Ct. App. 1998). In that case, a student gave a blood sample for a rubella test, and the sample also was tested for HIV without his knowledge or consent. The court characterized plaintiff's intrusion upon seclusion claim as "improper appropriation of private information resulting from the HIV test that was performed without his knowledge or consent." *Id.* at 1065. Finding a privacy interest in a person's blood sample and the information that may be gleaned from it, the court went on to hold that the unauthorized testing would be found by a reasonable person to be highly offensive. *Id.* at 1071.

¹⁴⁸ Makdisi, *supra* note 20, at 1019 ("[T]he intrusion tort is a viable means of preserving privacy rights in a variety of contexts and . . . it has been enlarged to consider more specialized categories of intrusions, including sexual harassment and drug testing in the employment context.").

¹⁴⁹ Kim, *supra* note 20, at 1551.

3. Protecting Privacy: Proposals

a. Electronic Monitoring

Legislation has been introduced at the federal and state levels to regulate electronic monitoring of employees. The general thrust of proposed legislation has been not to restrict monitoring to specific circumstances (such as when an employer has a reasonable suspicion of wrongdoing), but instead to require employers to give notice to employees of their monitoring practices. The first legislation proposed at the federal level was the ill-fated Privacy for Consumers and Workers Act (PCWA).¹⁵⁰ It was principally, but not exclusively, a notice bill.¹⁵¹ Despite being approved by a House subcommittee,¹⁵² the bill died what one commentator termed a “mysterious death” in committee.¹⁵³

The progeny of the PCWA rose up in 2000 with the introduction in Congress of the Notice of Electronic Monitoring Act (NEMA).¹⁵⁴ NEMA was less ambitious and even less restrictive than the PCWA – a “lean and mean” notice bill.¹⁵⁵ It did not prohibit any kind of monitoring, but required notice when an employee begins employment and then annual renotification.¹⁵⁶ The notice had to cover the following: the form of communication or computer use to be monitored; how the monitoring would be done; the kinds of information that would be obtained; the frequency of monitoring; and how the gathered information would be used.¹⁵⁷ Size and attitude of the lean and mean bill notwithstanding, NEMA, like its progenitor, died in Congress, the victim of lobbying by business interests.¹⁵⁸

¹⁵⁰ H.R. 1900, 103d Cong. (1993); S. 984, 103d Cong. (1993). The bills were introduced in the 1989-90 term and in subsequent terms, but no hearings were held. Wilborn, *supra* note 19, at 849 n.94.

¹⁵¹ Wilborn, *supra* note 19, at 849-50; Frayer, *supra* note 19, at 869.

¹⁵² *Labor Subpanel Approves Measure to Curtail Electronic Monitoring*, DAILY LAB. REP. (BNA), Feb. 24, 1994 (No. 36), at D14.

¹⁵³ Frayer, *supra* note 19, at 868; *see also* Wilborn, *supra* note 19, at 851 n.105 (noting the committees in which the bills stalled and died).

¹⁵⁴ H.R. 4908, 106th Cong. (2000). For detailed discussions of the bill, *see* Watson, *supra* note 19, and Frayer, *supra* note 19.

¹⁵⁵ Frayer, *supra* note 19, at 869.

¹⁵⁶ *Id.* at 870; Watson, *supra* note 19, at 93.

¹⁵⁷ H.R. 4908, 106th Cong. § 2711(b)(1)-(4) (2001).

¹⁵⁸ *Business Coalition Blocks Markup of Bill Requiring Electronic Monitoring Notification*, DAILY LAB. REP. (BNA), Sept. 15, 2000 (No. 180), at A9; Frayer, *supra* note 19, at 871.

State legislation to require notice has also been proposed. In 2001, for the third consecutive year, the California legislature passed an electronic monitoring notice bill,¹⁵⁹ and for the third time in three years Democratic Governor Gray Davis vetoed the bill.¹⁶⁰ The bill would have required employers to notify employees either in writing or electronically of the employer's workplace privacy and electronic monitoring policies and practices.¹⁶¹ Governor Davis, in the message accompanying his veto, recognized the legitimate need for employers to monitor and stated, "This bill places unnecessary and complicating obligations on employers and may lead to litigation by affected employees over whether the required notice was provided and whether it was read and understood by the employee."¹⁶²

Some commentators favor a legislative approach to electronic monitoring, while others favor a notice law such as NEMA.¹⁶³ Professor S. Elizabeth Wilborn, for example, favors a legislative solution, but does not think that the PCWA did enough because it was primarily a notice bill that would not have restricted the amount or scope of monitoring.¹⁶⁴ She favors comprehensive federal legislation that expressly states that employees have reasonable expectations of privacy in the workplace, requires employers to demonstrate a legitimate business interest in order to justify monitoring, requires employers who satisfy that burden to use the least intrusive means of monitoring available, and creates incentives for employers to use content-neutral monitoring techniques.¹⁶⁵ Another commentator favors, as part of larger privacy reforms, federal privacy legislation that limits the circumstances under which employers could electronically monitor, and prohibits

¹⁵⁹ S. 147, 107th Cong. (2001).

¹⁶⁰ *Privacy Bill for Employee E-Mail Vetoed for Third Time by California Gov. Davis*, DAILY LAB. REP. (BNA), Oct. 11, 2001 (No. 195) [hereinafter *Privacy Bill for Employee E-Mail*]. See generally Kesan, *supra* note 19 (discussing state and federal law applicable to electronic monitoring).

¹⁶¹ S.147, 107th Cong. (2001).

¹⁶² *Privacy Bill for Employee E-Mail*, *supra* note 160.

¹⁶³ Frayer, *supra* note 19, at 874 (recommending passage of NEMA); Richman, *supra* note 19, at 1361 ("A statute like the PCWA would send a strong message to employers and employees about liability for harms created by workers and the right to workplace privacy"); Watson, *supra* note 19, at 101 (stating that NEMA represented a "significant compromise by both sides in the debate").

¹⁶⁴ Wilborn, *supra* note 19, at 851.

¹⁶⁵ *Id.* at 880-81.

employment policies and agreements in which employees agree to such monitoring.¹⁶⁶

Most commentators hold out little hope for state legislative solutions for reasons such as business groups' lobbying and the ill fit between law limited by state boundaries and technology that realizes boundariless communication.¹⁶⁷ At least one commentator has suggested that a federal notice law that provides little privacy protection could provide impetus for passage of more protective state legislation.¹⁶⁸

Other commentators favor using the common law to address monitoring. One possibility is a tort approach that recognizes a public policy of employees' privacy rights in the workplace, and uses the tort theory of wrongful discharge in violation of public policy to limit the employment-at-will doctrine.¹⁶⁹ Another proposal is a contract approach incorporating principles that permit employers and employees to achieve their legitimate expectations in monitoring and privacy, respectively.¹⁷⁰

b. Genetic Discrimination

There are numerous calls for federal legislation on genetic discrimination, many by amending Title VII or the ADA.¹⁷¹ The Clinton administration, for example, called for federal legislation banning genetic testing in employment.¹⁷² Even the former Commissioner of the EEOC, Paul Miller, said that "additional legislation may be needed," notwithstanding the EEOC's position that the ADA covers genetic discrimination.¹⁷³ Several bills on genetic testing and genetic discrimination in insurance and employment have been

¹⁶⁶ Spencer, *supra* note 56, at 912.

¹⁶⁷ Kesan, *supra* note 19, at 301-02; Wilborn, *supra* note 19, at 842-43.

¹⁶⁸ Frayer, *supra* note 19, at 874 (recommending passage of NEMA, "which would serve as the foundation and inspiration for more expansive state and federal legislation in the future").

¹⁶⁹ Kim, *supra* note 17, at 720-29.

¹⁷⁰ Kesan, *supra* note 19, at 322-32.

¹⁷¹ Feldman & Katz, *supra* note 20; Brian M. Holt, Comment, *Genetically Defective: The Judicial Interpretation of the Americans with Disabilities Act Fails to Protect Against Genetic Discrimination in the Workplace*, 35 J. MARSHALL L. REV. 457 (2002); Wukitsch, *supra* note 20.

¹⁷² Miller, *supra* note 20, at 264.

¹⁷³ Miller, *supra* note 20, at 265.

introduced since 1997.¹⁷⁴ In the most recent session of Congress, although the Bush administration announced it supported genetic discrimination legislation,¹⁷⁵ the bills bogged down in House and Senate committees under questions of overlap with the ADA, HIPAA, and other laws.¹⁷⁶

One commentator, addressing genetic privacy beyond the employment context, viewed the tort theory of invasion of privacy, primarily the intrusion upon seclusion branch, as adequate to address the problems if the theory were tweaked.¹⁷⁷ While not specifying whether she favors a legislative or common law approach, Professor Pauline Kim argues that genetic intrusion is better addressed under a privacy rights model than an anti-discrimination model.¹⁷⁸ In discussing a number of the issues under a privacy rights model, Kim did not create a template for legislation.¹⁷⁹ Kim, who also has written about electronic monitoring, favored a common law approach to that invasion of privacy issue,¹⁸⁰ because it involves balancing of interests and is thus ill-suited to a statutory approach.

Most proposals for new law to address electronic monitoring and genetic testing and discrimination have been legislative approaches. The principal weakness of this approach is that it does not recognize that statutes lack the flexibility required to balance the interests of employers and employees in matters of privacy. General or specific prohibitions can be articulated in statutes, but such unqualified prohibitions are not necessary or desirable in this area. By and large, commentators and law reformers have selected a tool too blunt for this delicate job, which requires calibrating that can only be achieved through the common law.

¹⁷⁴ *Id.*; Feldman & Katz, *supra* note 20, at 409.

¹⁷⁵ *See Democrats Welcome Bush's Statement on Genetic Discrimination Legislation*, DAILY LAB. REP. (BNA), June 26, 2001 (No. 122), at A8.

¹⁷⁶ *Sen. Kennedy to Address Genetic Bias Bill's Overlap of ADA, Privacy Regulations*, DAILY LAB. REP. (BNA), July 26, 2001 (No. 143), at A1; *Overlap in Genetic Bias Legislation Is Examined in House Hearing on Bill*, DAILY LAB. REP. (BNA), July 12, 2001 (No. 133), at A8.

¹⁷⁷ Makdisi, *supra* note 20, at 978-79 ("As in many other areas where statutory protections are inadequate to guard against a perceived harm, the viability of common law actions for intrusion upon genetic privacy is critical.").

¹⁷⁸ Kim, *supra* note 20, at 1551.

¹⁷⁹ *Id.* at 1543.

¹⁸⁰ *See supra* notes 169-70 and accompanying text.

B. *Bullying*

1. Bullying: Definition and Examples

Workplace bullying may be the “corporate buzzword for the new millennium, pushing sexual harassment from its perch.”¹⁸¹ The problem has virtually spawned an industry of its own. There are organizations that maintain websites, conduct conferences, and sponsor legislation to eradicate workplace harassment.¹⁸² There are companies that will perform audits, identify bullying in workplaces, and attempt to eliminate it.¹⁸³

Reports of workplace abuse are legion, ranging from the insensitive to the utterly inhumane. A recent cause célèbre is by no means the worst case, but it does demonstrate the senseless workplace meanness often perpetrated by the powerful upon the powerless. According to the complaint of Jodee Berry, a waitress at a Hooters restaurant in Panama City, Florida, management announced that the waitress who sold the most beer in a month would win a Toyota.¹⁸⁴ When Ms. Berry sold the most beer, she was blindfolded and taken out to the restaurant’s parking lot, where she expected to be presented with her new car. Instead, when the blindfold was removed, she saw a toy Yoda doll (the Jedi Master from the *Star Wars* movies). She quit and sued for breach of contract and fraud. Although the restaurant manager contended that the contest was an April Fools’ Day joke, the corporate owner of the restaurant settled the case, agreeing to give Ms. Berry a new car.¹⁸⁵

A case in Texas, *GTE Southwest, Inc. v. Bruce*,¹⁸⁶ has garnered considerable attention and been published in some case books as an exemplar of the tort of intentional infliction of

¹⁸¹ Karlak, *supra* note 16.

¹⁸² In the United States, there is The Workplace Bullying & Trauma Institute (formerly the Campaign Against Workplace Bullying). See *supra* note 16. In the United Kingdom, there is a UK National Workplace Bullying Advice Line. See Bully OnLine Website, at <http://www.bullyonline.org/workbully/index.htm> (last visited Aug. 1, 2003).

¹⁸³ See Karlak, *supra* note 16. Envisionworks is such a company. See Envisionworks Website, at <http://www.envisionworks.net> (last visited August 9, 2003).

¹⁸⁴ Associated Press, *Judge Says Waitress Can Sue Hooters in “Toy-Yoda” Case*, S. FLA. SUN-SENTINEL, Oct. 14, 2001, at B6.

¹⁸⁵ See, e.g., *Ex-Hooters Waitress Settles Suit*, THE STATE (Columbia, S.C.), May 10, 2002, at 9; *What a Hoot*, FIN. TIMES, May 10, 2002, at P13.

¹⁸⁶ 998 S.W.2d 605 (Tex. 1999).

emotional distress.¹⁸⁷ The case involved a male supervisor who managed a small office. Three employees sued for intentional infliction of emotional distress because the supervisor engaged in frequent profanity-laced tirades,¹⁸⁸ required employees to perform redundant janitorial chores, had employees stand before him for extended periods while he stared at them, and frequently threatened employees with termination.¹⁸⁹ Perhaps most memorably, this "bull" of a supervisor would lower his head, straighten his arms by his sides and ball up his fists, and lunge at employees, stopping just short of making contact with their faces as he screamed at them.¹⁹⁰

The Texas Supreme Court embraces a strong version of the employment-at-will doctrine, and in employment settings the court has been loath to recognize tort theories,¹⁹¹ including intentional infliction of emotional distress.¹⁹² Indeed, the court in *GTE Southwest* stated that because many aspects of managing a business are unpleasant for employees, Texas courts "have adopted a strict approach to intentional infliction of emotional distress claims arising in the workplace."¹⁹³ But the conduct of the supervisor in this case was so severe and occurred so regularly that even the Texas Supreme Court concluded it should not be expected in the workplace or tolerated in a civilized society.¹⁹⁴

2. Bully Busting: Inadequacy of Current Law

There exist only two types of law that address harassment or abuse in the workplace. The first type is the harassment theories under Title VII and the other employment anti-discrimination laws. The second type is tort law, primarily

¹⁸⁷ See, e.g., DAN B. DOBBS & PAUL T. HAYDEN, TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 498 (4th ed. 2001).

¹⁸⁸ The "F word" and the "MF word" apparently were two of his favorites. When one employee asked him to stop because it was offensive, he got in front of her face and screamed, "I will do and say any damn thing I want." *GTE Southwest*, 998 S.W.2d at 613.

¹⁸⁹ *Id.* at 613-14.

¹⁹⁰ *Id.*

¹⁹¹ Texas recognizes a narrow version of the tort of wrongful discharge in violation of public policy. See *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985); *Johnson v. Del Mar Distributing Co.*, 776 S.W.2d 768 (Tex. Ct. App. 1989).

¹⁹² Gergen, *supra* note 28, at 1702 (stating that aside from cases involving sexual harassment, employees rarely succeed on IIED claims).

¹⁹³ *GTE Southwest*, 998 S.W.2d at 612.

¹⁹⁴ *Id.* at 617.

the theory of intentional infliction of emotional distress. Commentators have argued that the two types of law provide inadequate protection.¹⁹⁵

Regarding harassment law, the limitation on coverage of abusive conduct in the workplace is obvious. One who cannot prove that abusive conduct is *because of* sex, or race, or some other protected characteristic cannot recover, no matter how bad the conduct. This limitation is even more severe than it appears at first blush. When harassment is because of a protected characteristic has been a much-litigated issue.¹⁹⁶ The result has been that in many cases involving sexual conduct, the plaintiff cannot recover because a court reasons that the because-of-sex requirement is not satisfied.

The Supreme Court addressed a because-of-sex issue in *Oncale v. Sundowner Offshore Servs., Inc.*¹⁹⁷ In that case, the Court held that a claim does not fail to satisfy the requirement simply because it is same-sex sexual harassment. The Court did note, however, that the requirement is harder to satisfy in such cases. The Court's opinion also includes statements that appellate courts have relied upon to deny recovery in a number of subsequent sexual (and other) harassment cases. Rejecting the argument that it was transforming Title VII into "a general civility code for the American workplace,"¹⁹⁸ the Court stated that "[t]he critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."¹⁹⁹

As for tort law, plaintiffs have prevailed on IIED claims in workplace settings in only a small percentage of cases.²⁰⁰ Courts often dispose of the cases on summary judgment,

¹⁹⁵ See *infra* Part II.B.2.

¹⁹⁶ See, e.g., David S. Schwartz, *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697 (2002).

¹⁹⁷ 523 U.S. 75 (1998).

¹⁹⁸ *Id.* at 80.

¹⁹⁹ *Id.* (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)). Professor David Schwartz criticizes the *Oncale* decision for its rejection of the "sex per se" shortcut to proving "because of sex." Schwartz, *supra* note 196, at 1703, 1728-48. By this he means that "sexual conduct in the workplace is always, without more, 'because of sex.'" *Id.* at 1705.

²⁰⁰ PERRITT, *supra* note 115, at 265, 268-76; Regina Austin, *Employer Abuse, Worker Resistance, and the Tort Theory of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1, 5-8 (1998); Gergen, *supra* note 28, at 1702 ("Despite the apparent openness of the tort, infliction claims by employees rarely succeed."); Ehrenreich, *supra* note 23, at 55-56; Summers, *supra* note 24, at 74 ("Suits for intentional infliction of emotional distress are seldom successful.").

finding that the high threshold of "outrageous" conduct (so bad that civilized society should not tolerate it) is not met. The most successful type of IIED case typically involves sexual harassment.²⁰¹ The most likely reason for courts' reluctance to permit recovery on IIED claims for workplace abuse is their concern that the tort theory will become a way to circumvent the employment-at-will doctrine, thus serving as a stealthy wrongful discharge claim.²⁰²

Other tort theories, such as battery and false imprisonment,²⁰³ have applied to some cases of workplace abuse, but they do not apply to general abusive conduct.²⁰⁴ In cases of sexual harassment,²⁰⁵ plaintiffs have also successfully used the tort theory of invasion of privacy (intrusion upon seclusion branch).²⁰⁶ In some cases involving abusive discharge, plaintiffs have also used the tort of wrongful discharge in violation of public policy, but most states require identification of a definite public policy,²⁰⁷ as well as harm to society at large – not just to the individual – that will follow from not imposing liability for the discharge.²⁰⁸

Many commentators thus deem current law inadequate to protect against workplace bullying. Harassment theory under employment anti-discrimination law is too narrow in its "because of" requirement. As for tort law, plaintiffs infrequently prevail on IIED claims because one of its elements

²⁰¹ Gergen, *supra* note 28, at 1702; Dennis P. Duffy, *Intentional Infliction of Emotional Distress and Employment at Will: The Case Against "Tortification" of Labor and Employment Law*, 74 B.U. L. REV. 387, 404 (1994). See, e.g., *Hoffman-LaRoche, Inc. v. Zeltwanger*, 69 S.W.3d 634 (Tex. App. 2002) (finding that sexual harassment constituted outrageous conduct and affirming \$10 million judgment for employee, including \$8 million in exemplary damages), *review granted*, 2002 Tex. LEXIS 181 (Tex. Oct. 31, 2002).

²⁰² See, e.g., Austin, *supra* note 200, at 9 ("The courts are particularly wary of attempts to use [IIED] to evade the rules sanctioning the summary discharge of at-will employees."); Duffy, *supra* note 201, at 396.

²⁰³ See Ehrenreich, *supra* note 23, at 22.

²⁰⁴ See, e.g., *Miraliakbari v. Pennicooke*, 561 S.E.2d 483 (Ga. Ct. App. 2002) (dismissing claim for false imprisonment).

²⁰⁵ See, e.g., *Phillips v. Smalley Maintenance Servs., Inc.*, 435 So. 2d 705 (Ala. 1983); see also Makdisi, *supra* note 20, at 1006-07.

²⁰⁶ See *supra* notes 114-29 and accompanying text for a fuller discussion of this tort theory.

²⁰⁷ See, e.g., *Green v. Bryant*, 887 F. Supp. 798 (E.D. Pa. 1995); *Gardner v. Loomis Armored Inc.*, 913 P.2d 377 (Wash. 1996).

²⁰⁸ See cases cited *supra* note 207; PERRITT, *supra* note 115, at ch. 3; Parker, *supra* note 23, at 392-402.

is deemed virtually impossible to satisfy, a problem exacerbated in the employment context.

3. Bully Busting: Proposals

Among academic commentators calling for legal responses to workplace abuse and harassment,²⁰⁹ one writes that “no one has attempted systematically to define when workplace humiliation should be actionable.”²¹⁰ Professor David Yamada and the Workplace Bullying & Trauma Institute have been at the vanguard of efforts to fashion new statutory law to prohibit workplace bullying.²¹¹ Indeed, the Institute reports that in 2003, California will become the first state in which the proposed legislation is introduced in the state legislature.²¹² The proposed legislation, designed for enactment at the state or federal level, would create a cause of action called “intentional infliction of a hostile work environment.”²¹³ Essentially, Professor Yamada uses the elements of a hostile work environment harassment claim under Title VII,²¹⁴ including the *Ellerth/Faragher* affirmative defense if the harassment does not culminate in a “tangible employment action.”²¹⁵ Thus, what

²⁰⁹ See, e.g., Yamada, *supra* note 16; Fisk, *supra* note 16; Ehrenreich, *supra* note 23; Austin, *supra* note 200.

²¹⁰ Fisk, *supra* note 16, at 73.

²¹¹ See *supra* note 16.

²¹² See The Workplace Bullying & Trauma Institute Website, *supra* note 16.

²¹³ Yamada, *supra* note 16, at 524-28.

²¹⁴ Although sexual harassment law is the best known type of harassment law, hostile work environment claims are recognized on all bases covered by Title VII, as well as the ADEA and the ADA.

²¹⁵ Yamada, *supra* note 16, at 524. Yamada defines the statutory theory of intentional infliction of a hostile work environment this way:

In order to prove intentional infliction of a hostile work environment, the plaintiff must establish by a preponderance of the evidence that the defendant employer, its agent, or both, intentionally subjected the plaintiff to a hostile work environment. A hostile work environment is one that is deemed hostile by both the plaintiff and by a reasonable person in the plaintiff's situation. Employers are to be held vicariously liable for hostile work environments intentionally created by their agents.

Id.

The *prima facie* cause of action outlined immediately above makes employers strictly liable for the abusive behavior of their employees. This alone provides employers with a strong incentive to prevent workplace bullying. However, the law also should reward proactive attempts to prevent bullying and to effectively address allegations that bullying has occurred. Accordingly, under this proposed legal framework, when an employer is sued for the acts of an agent that allegedly created a hostile work environment, it shall be an affirmative defense for the employer only if:

he advocates is "status-blind hostile work environment" legislation.²¹⁶

Professor Rosa Ehrenreich has offered a different approach to workplace harassment.²¹⁷ She argues for a pluralistic approach to harassment in which adjusted tort law theories, principally IIED, augment sexual harassment and other harassment theories under the anti-discrimination laws. Although the focus of her proposal is a fuller understanding and treatment of sexual harassment in the law, her proposal would also benefit those who suffer abuse but cannot recover under the anti-discrimination laws.²¹⁸

Among the proposals for new law to address status-neutral workplace harassment, those invoking new statutes are misguided. Harassment and abuse are concepts that are too amorphous to be prohibited by statute. Any statute would say, in effect, "Don't be mean." Although the principle is laudatory, this clearly is a misuse of legislation as a regulatory mechanism, as it would provide no guidance whatsoever. Moreover, since it would likely be so vague, the statute would not alter the case-by-case adjudication that takes place now under the common law protections. It would thus be ineffective *and* superfluous. By contrast, adjusting common law tort theories would fine-tune the law and harmonize it with societal needs on a case-by-case basis, as well as avoid adding unnecessary law to an already crowded legislative field.

III. THE PATCHWORK OF EMPLOYMENT LAW IN THE UNITED STATES

Making the case for common law rather than legislative approaches to workplace problems requires an overview of the current state of labor and employment law in the United States, and a brief history of the development of that law. This section devotes considerable attention to the employment-at-will doctrine because of its pervasiveness and centrality in U.S.

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- (a) the employer exercised reasonable care to prevent and correct promptly any actionable behavior; and,
 - (b) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Id. at 527.

²¹⁶ *Id.* at 523.

²¹⁷ Ehrenreich, *supra* note 23.

²¹⁸ *Id.* at 61.

employment law. Furthermore, the power and prerogative vested in employers under employment at will have so skewed common law analysis by courts that it is not surprising that employee rights advocates have little confidence in the common law and instead favor employment legislation. Still, as this section explains, the history of American employment law provides good reasons to agitate for a reinvigorated common law of the workplace.

A. *Employment at Will*

The beginning point for assessing U.S. employment law is the employment-at-will doctrine.²¹⁹ It is the hallmark of labor and employment law in the United States, serving as the default rule²²⁰ in most states for over a century.²²¹ The most oft-quoted statement of the doctrine is that absent an agreement to the contrary, employers can fire employees for a good reason, a bad reason or no reason at all.²²² Despite the dubious proposition that someone can do something for no reason at all, the now famous, or infamous, iteration of employment at will encapsulates the absolute power of employers to govern the workplace. Although employment at will expressly addresses employers' absolute right to terminate employees, it is about much more. One who has the power to terminate also has the power to do as she pleases with respect to all terms and conditions of employment.²²³ At its core, employment at will is about employer power and prerogative.²²⁴

²¹⁹ Summers, *supra* note 24, at 66 ("To understand the American system, therefore, it is necessary to understand the doctrine of employment at will, its fundamental assumptions, and its ambivalence. More importantly, it is necessary to recognize where that fundamental assumption has shaped our labor law.").

²²⁰ See, e.g., Cass R. Sunstein, *Switching the Default Rule*, 77 N.Y.U. L. REV. 106 (2002).

²²¹ Professor Andrew Morriss has studied the timing of states' adoption of employment at will. Andrew Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679, 681-82 (1994). In 1851 Maine was the first state to adopt the rule through common law. By 1908, most states had adopted it by case law. *Id.* There is an extensive body of literature regarding the origins of employment at will and reasons for the propagation and perpetuation of the doctrine. See generally Summers, *supra* note 24, at 66-68; Parker, *supra* note 23, at 349-52.

²²² See *Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 520 (1884) ("All may dismiss their employe[e]s 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."), *overruled on other grounds*, *Hutton v. Watters*, 179 S.W. 134 (Tenn. 1915).

²²³ See Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will*

The United States, the largest economy in the world, is a maverick among industrialized nations in clinging to employment at will.²²⁵ The member nations of the European Union, for example, have substantially more employment protection law than the United States.²²⁶ Other nations with more protective labor laws look wistfully at the productive economy and low unemployment of the United States, but they disparage our limited legal regulation of the workplace and comparatively slight protection of employee rights.²²⁷ Employment at will is often credited with creating the

World, 74 TEX. L. REV. 1655, 1657 (1996) ("The surrounding at-will regime affects not only the aftermath of an arguably wrongful discharge and the availability of a remedy; it also affects employee conduct and dynamics at the workplace."); Summers, *supra* note 24, at 65 ("Its tentacles reach into seemingly remote areas of labor law, for at its roots is a fundamental legal assumption regarding the relations between an employer and its employees."). Cf. Mark A. Rothstein, *Wrongful Refusal to Hire: Attacking the Other Half of the Employment-at-Will Rule*, 24 CONN. L. REV. 97, 98 (1991) ("[I]t has become associated with the more general principle that, absent a statute to the contrary, an employer has the right to hire or fire any person for any reason.").

²²⁴ Summers, *supra* note 24, at 65 ("The law, by giving total dominance to the employer, endows the employer with the divine right to rule the working lives of its subject employees."). Cf. Austin, *supra* note 200, at 8-12 (discussing the wide latitude courts give employers to use abusive authority to direct employees' activities).

²²⁵ See, e.g., Summers, *supra* note 24, at 65 ("The United States, unlike almost every other industrialized country and many developing countries, has neither adopted through the common law or by statute a general protection against unfair dismissal or discharge without just cause, nor even any period of notice."); Donald C. Dowling, Jr., *The Practice of International Labor & Employment Law: Escort Your Labor/Employment Clients into the Global Millennium*, 17 LAB. LAW. 1, 13 (2001) ("American businesses are steeped in their unique and peculiar employment-at-will doctrine, which even other Anglo-system countries like England, Canada, and Australia rejected years ago."). Unsurprisingly, The United States has not ratified the convention of the International Labour Organization on Termination of Employment, which provides that "employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment, or service." International Labor Organization, Termination of Employment Convention, June 22, 1982, available at <http://www.ilo.org>. The convention has been ratified by 32 countries.

²²⁶ Kohler, *supra* note 32, at 103-04 ("As is generally known, the United States historically has provided comparatively meager formal legal protections of the employment relationship. Foreign observers typically characterize us as a 'hire and fire' society . . .").

²²⁷ See Roger Blanpain, *Employment and Labour Law: The European Union*, in COMPARATIVE LABOUR AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMIES 129 (Roger Blanpain, et al. eds., 6th ed. 1998). Prime Minister Tony Blair of the United Kingdom has championed the notion of a "third way," between the deregulation, low labor standards, and low unemployment of the United States and the United Kingdom on the one hand, and the heavy regulation, high labor standards, and high unemployment of the European nations. See, e.g., *Roundtable Discussion: What the Experiences of the Recent Past Tell Us About the Labor and Employment Law of the Future*, 76 IND. L. J. 177, 183 (2001) (comments of Professor Catherine Barnard of Trinity College, Cambridge University).

flexibility in the United States labor market, although that proposition is dubious.²²⁸

B. Employment Law Expansion by Legislation and Common Law

Despite its notoriety, employment at will does not, of course, reign unchecked in the United States. The current landscape of labor and employment law in the United States is a patchwork of federal legislation and related case law, as well as state legislation and common law tort and contract theories. At the federal level, the Wagner Act (NLRA) was enacted in 1935.²²⁹ The Fair Labor Standards Act (FLSA) followed in 1938.²³⁰ The FLSA represented a different approach to legal regulation of the workplace than that of the NLRA. The NLRA sought to invest the weaker party, workers, with more power so that they could decide what they wanted from the employer, make their demands known, and obtain whatever their collective power enabled them to obtain. Section 7, the heart of the Act, recognized the following general rights of employees: self-organizing; forming, joining, or assisting labor organizations; bargaining collectively through representatives of their own choosing; engaging in concerted activities for the purpose of collective bargaining or other mutual aid or protection; and the right to abstain from the foregoing activities.²³¹ Everything that was legal was on the table under the NLRA – workers could try to obtain whatever they wanted.²³² Other than the broad § 7 rights, the NLRA made

²²⁸ John T. Addison, *The U.S. Employment Miracle in Comparative Perspective*, 19 COMP. LAB. L. & POL'Y J. 283, 291(1998); Kohler, *supra* note 32, at 106 (stating this commonly held belief, but questioning it).

²²⁹ Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-69 (2000)).

²³⁰ Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201-219 (2000)).

²³¹ 29 U.S.C. § 157 (2000).

²³² See Eugene Scalia, *Ending Our Anti-Union Federal Employment Policy*, 24 HARV. J.L. & PUB. POL'Y 489, 490 (2001) (describing the NLRA as "constitutive," establishing a framework for employees to obtain for themselves what the employment laws provide by direct intervention). Senator Wagner's legislative assistant and the principal draftsman of the statute, Leon Keyserling, said, "[I]t was our view that the greatest contribution to greater equity and the distribution of the product between wages and profit would come, not through the definition of terms by government, but by the process of collective bargaining with labor placed in a position nearer to equality." Kenneth M. Casebeer, *Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act*, 42 U. MIAMI L. REV. 285, 297 (1987).

nothing an inalienable right of the workers. In contrast, the FLSA declared a minimum wage, a maximum number of hours before overtime was due, and minimum ages for engaging in work and for certain types of work. Thus, unlike the NLRA, the FLSA established minimum rights, mandated by Congress, which cannot be altered through bargaining between employer and employee.

In 1960 there were only two generally applicable federal labor acts. Beginning in 1963, a plethora of federal employment laws were enacted,²³³ from the Equal Pay Act in 1963 to the Family and Medical Leave Act (FMLA) in 1993. Since then the expansion has stopped at the federal level. There have been numerous bills introduced in Congress, but none enacted. Still, the period of 1963-1993 witnessed a proliferation of federal employment legislation – at least compared with the history of labor and employment law in this nation before the 1960s.²³⁴

States also have been very active in the last four decades in creating employment law, both by legislation and case law.²³⁵ Some state statutes more or less track analogous federal statutes, such as state employment discrimination statutes,²³⁶ while others create rights not recognized by federal law. Among the types of employment laws enacted by state legislatures are workers' compensation acts, wage payment acts, covenant-not-to-compete laws, employment reference statutes, and a variety of other individual employment rights statutes. State courts have also recognized numerous contract and tort theories of recovery, including implied contracts, breach of the covenant of good faith and fair dealing, promissory estoppel, wrongful termination in violation of public policy, invasion of privacy, and intentional infliction of emotional distress.²³⁷ Wrongful discharge in violation of public

²³³ See *supra* notes 1-15 and accompanying text.

²³⁴ See, e.g., George Nicolau, *A Comparison of Union and Non-Union Employee Protections in Ireland and the United States*, 14 N.Y. INT'L L. REV. 33, 34 (2001) ("There has been, in the United States, over the last four decades, what I have called elsewhere, the 'Europeanization of the American workplace'—an overlay of protective legislation that is relatively new and which introduces protections that largely did not exist before the 1960s.").

²³⁵ Rothstein, *supra* note 223; Kohler, *supra* note 32, at 106-07; Michael D. Moberly & Carolann E. Doran, *The Nose of the Camel: Extending the Public Policy Exception Beyond the Wrongful Discharge Context*, 13 LAB. LAW. 371 (1997).

²³⁶ See Michael D. Moberly, *Proceeding Geometrically: Rethinking Parallel State and Federal Employment Discrimination Litigation*, 18 WHITTIER L. REV. 499 (1997).

²³⁷ See, e.g., Kohler, *supra* note 32, at 120-21.

policy is a tort created specifically for the employment setting,²³⁸ and it is the most recent tort to gain general acceptance throughout the nation.²³⁹

It is fair to say that the hire-and-fire employment law regime of the United States has developed a considerable body of employment regulation since 1960.²⁴⁰ Reasons commonly assigned for the high level of activity at both the state and federal level, through both legislation and case law development, are the concurrent precipitous decline in union representation in the 1960s through the 1990s²⁴¹ and the emergence of an individual employee rights approach to regulating employment. Indeed, Congress has abandoned the collective rights regime of collective bargaining and wholeheartedly embraced the individual rights approach to regulating employment.²⁴² Yet the law would not leave

²³⁸ Professor Mark Gergen distinguishes between wrongful discharge in violation of public policy on the one hand, and collateral torts, such as defamation, invasion of privacy, and intentional infliction of emotional distress on the other. Gergen, *supra* note 28, at 1693. The tort of wrongful discharge in violation of public policy actually can be traced to as early as 1959. See Kenneth A. Sprang, *Beware the Toothless Tiger: A Critique of the Model Employment Termination Act*, 43 AM. U. L. REV. 849, 865 (1994) (citing California case). It did not take hold, however, until the publication of Professor Lawrence Blade's pathbreaking article, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967). Professor Blades actually argued for a broader abusive discharge tort than the current versions of wrongful discharge in violation of public policy, but his article fueled the debate over tort law's role in limiting employment at will. *Id.*

²³⁹ See, e.g., Bernstein, *supra* note 39, at 1547 (calling wrongful discharge the most precarious of the four new successful torts—the other three being IIED, invasion of privacy, and product liability). The only four states that do not recognize some version of wrongful discharge in violation of public policy are Alabama, Louisiana, New York, and Georgia. Even this listing is questionable because Louisiana has a statute that codifies some branches of the tort. LA. REV. STAT. ANN. § 967 (2003). Montana does not really recognize the tort, but it has a general wrongful discharge statute. MONT. CODE ANN. §§ 39-2-901 to 915 (2002).

²⁴⁰ See, e.g., Kohler, *supra* note 32, at 104 (“Despite our renown for relatively abstemious public intervention in workplace relationships and our general preference for private ordering, the previous ten to fifteen years has been a period of unusual legislative and judicial activity.”); Duffy, *supra* note 201, at 387-88 (discussing the “rapid change” in U.S. employment law).

²⁴¹ Union density in private sector employment decreased from about a third of the workforce at its height in the mid to late 1950s to less than ten percent by the end of the century. *Union Members Decline to 16.3 Million as Share of Employed Slips to 13.5 Percent*, DAILY LAB. REP. (BNA), Jan. 19, 2001 (No. 13), at D16. Kohler, *supra* note 32, at 104 (discussing declining union density as a reason for expansion of employment law); Paul Berks, *Social Change and Judicial Response: The Handbook Exception to Employment-At-Will*, 4 EMPLOYEE RIGHTS & EMP. POL'Y J. 231, 234-35 (2000) (“[U]nprecedented decline in union density and influence at the end of the 1970s and beginning of the 1980s effectively eliminated collective bargaining as a genuine alternative to the at-will regime.”).

²⁴² James J. Brudney, *Reflections on Group Action and the Law of the*

employees unprotected; individual rights laws began filling gaps when union representation and collective bargaining were not viable options, as was the case for most employees.²⁴³

Historically, then, the American workplace has been regulated in several different ways,²⁴⁴ resulting in some discernable divisions. First, employment law can be implemented at either the federal or state level. Second, it can be either statutory or common law. A third classification divides employment law into the collective rights/bargaining approach of the NLRA, and the individual rights approach that has been the regulation of choice during the last fifty years.²⁴⁵ The individual rights approach includes federal and state statutes, as well as state contract and tort theories of recovery.

Within the individual rights statutes, a further division exists. There are minimum rights statutes that prohibit or mandate specific actions by employers, and those that do not. For example, the FLSA requires employers to pay a minimum wage and overtime pay, and it restricts child labor. Likewise, the FMLA mandates that employers grant employees up to twelve weeks of leave for certain family and medical purposes. Other examples include the WARN Act, which requires employers to give sixty days notice of a plant closing or mass layoff, and the Employee Polygraph Protection Act (EPPA), which prohibits employers from requiring employees to take polygraph examinations, or from taking adverse employment actions based on the results, except under certain circumstances.

Workplace, 74 TEX. L. REV. 1563, 1571 (1996) ("At some point during this legislative barrage, it became clear that Congress viewed government regulation founded on individual employment rights, rather than collective bargaining between private entities, as the primary mechanism for ordering employment relations and redistributing economic resources."); Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 BERKELEY J. EMP. & LAB. L. 1, 73 (1999) ("Since the 1960s, the labor movement has suffered from American liberalism's rejection of the group basis of its own past and its inability to find a place for group rights within the model of individual rights it clings to so dearly.").

²⁴³ Summers, *supra* note 35, at 10 ("The consequence is foreseeable, if not inevitable; if collective bargaining does not protect the individual employee, the law will find another way to protect the weaker party.").

²⁴⁴ Professor Kenneth Dau-Schmidt discusses the strengths and weaknesses of four different methods used to address the legal protection of workers: individual bargaining, collective bargaining, legislative regulation, and development of the common law. Dau-Schmidt, *supra* note 23, at 685.

²⁴⁵ See, e.g., Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575 (1992).

Those minimum rights statutes stand in contrast to the anti-discrimination statutes. Although anti-discrimination laws are a type of individual rights law and are usually classified as minimum rights statutes, they differ from the foregoing minimum rights laws in an important way. The FLSA, FMLA, and other laws of that minimum-rights ilk require or prohibit employer action, without addressing employers' motivation (with the exception of the anti-retaliation provisions). In other words, an employer paying below minimum wage or denying the FMLA leave provisions violates the statute regardless of the reason for the action. In contrast, the anti-discrimination statutes do not prohibit employment actions unless they are taken because of the employee's race, sex, disability, etc.²⁴⁶ They prohibit employment actions motivated by bad reasons.

The history of employment law in the United States reveals different regulatory approaches to various issues at various times. In the early part of the twentieth century, the collective rights model prevailed through federal legislation. The 1960s witnessed the beginning of the individual rights regime, again through federal legislation. In turn, from the 1970s through the end of the century, the states created individual employment rights through statutes and case law. This evolution stemmed from the recognition that the one-size-fits-all approach of the NLRA did not work. The changing landscape of employment in the United States required new and different law at different times. In light of this diverse history, one should not expect a single approach to work in the next century.²⁴⁷

C. *Regulating Firing and Other Terms and Conditions of Employment*

Much of the reform and debate in employment law during the latter part of the twentieth century was about limiting employment at will by recognizing different types of wrongful discharge law, including the employment discrimination statutes.²⁴⁸ Although Title VII covers all types of

²⁴⁶ See, e.g., Kim, *supra* note 20, at 1517.

²⁴⁷ Cf. Summers, *supra* note 35, at 24 ("I fear that because of the wide variety of rights to be protected and our hesitant legal recognition of them, the solution must be piecemeal and will inevitably be incomplete.").

²⁴⁸ See Estlund, *supra* note 223 (discussing the evolution and state of wrongful discharge law); Parker, *supra* note 23 (discussing common law and legislative

adverse employment actions, and at its inception was viewed more as a means of addressing discriminatory refusals to hire, most Title VII cases in the last twenty years or so have been termination cases.²⁴⁹ Harassment law under Title VII is the most significant departure from a focus on wrongful discharge under the employment discrimination statutes. Of course, there have been laws that regulate terms and conditions of employment other than discharge, such as the FLSA, the FMLA, the Equal Pay Act (EPA), and the WARN Act at the federal level, and workers' compensation and wage payment statutes at the state level. Still, it is fair to say that the major battle of the latter half of the twentieth century was largely about employment at will and wrongful discharge.

Only one state in the nation has legislatively abrogated employment at will, and no other state is poised to do so. Moreover, statutory modifications of the at-will doctrine have not so clearly favored employees claiming wrongful discharge.²⁵⁰ In 1996, Arizona enacted the euphemistically named Arizona Employment Protection Act, which consolidated the legal theories that could be pursued in termination cases.²⁵¹ The Arizona Act was passed in reaction to a pro-employee decision of the state supreme court, and most have understood it to be a pro-employer effort to curtail tort and contract theories of recovery.²⁵² Under the Arizona Act, employees can sue under only the theories delineated therein, and the courts do not have discretion to recognize other claims. Specifically, the Act restricts courts from expanding the tort of wrongful discharge

approaches to employment at will).

²⁴⁹ John J. Donohue III & Peter Seligmann, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1015-16 (1991).

²⁵⁰ Parker, *supra* note 23, at 373 ("Workers in other jurisdictions could probably expect the same pro-employer cast existing in the Montana legislation.").

²⁵¹ ARIZ. REV. STAT. §41:1461 (1996).

²⁵² The act was intended to stem the expansion of wrongful discharge in violation of public policy the Arizona legislature discerned in the Arizona Supreme Court's decision in *Wagenseller v. Scottsdale Mem. Hosp.*, 710 P.2d 1025 (Ariz. 1985) (en banc) (the famous "Moon River" case). See Marzetta Jones, Note, *The 1996 Arizona Employment Protection Act: A Return to the Employment-At-Will Doctrine*, 39 ARIZ. L. REV. 1139 (1997) (describing the act as the "Legislature's response to the trend away from employment-at-will that began in the mid-1980s"); Jenny Clevenger, Comment and Legislative Review, *Arizona's Employment Protection Act: Drawing a Line in the Sand Between the Court and the Legislature*, 29 ARIZ. ST. L.J. 605 (1997) (stating that the act "effected dramatic changes . . . halting, and, in some instances, reversing the expansion of employee rights in Arizona and severely limiting recovery in tort where those rights are violated").

in violation of public policy beyond legislatively recognized policies.

Even the heralded Montana Wrongful Discharge from Employment Act of 1987,²⁵³ which made Montana the only state in the nation to generally abrogate employment at will by prohibiting terminations without good cause, may not have been such a good result for employee plaintiffs. It, too, was a reaction by employers and insurers to the expansion of the common law theory of the covenant of good faith and fair dealing, which had resulted in some large recoveries by plaintiffs.²⁵⁴ Because of limitations on remedies, the average size of jury awards has been substantially reduced, with the median award in one survey being zero.²⁵⁵ The Model Employment Termination Act (META), promulgated by the National Conference of Commissioners on Uniform State Laws in 1991, has not been adopted, or even seriously considered, by any state to date. Further, employee rights advocates have not uniformly applauded it.²⁵⁶

Employment at will has withstood the efforts by employment law reformers. While many contract and tort theories have been recognized since the 1970s, there has been retrenchment in the last decade or so, and employment at will is perhaps stronger now than it was twenty years ago.²⁵⁷ Although one could predict in the 1980s and early 1990s that more states would follow Montana's lead in enacting wrongful discharge law,²⁵⁸ the resurgence of employment at will and the ebbing of contract and tort theories limiting the doctrine indicates that there will be no more state legislation enacted in the foreseeable future.²⁵⁹ It cannot be surprising that

²⁵³ MONT. CODE ANN. §§ 39-2-901 to 914 (2002).

²⁵⁴ Marc Jarsulic, *Protecting Workers From Wrongful Discharge: Montana's Experience With Tort and Statutory Regimes*, 3 EMPLOYEE RTS. & EMP. POL'Y J. 105, 107 (1999); Parker, *supra* note 23, at 371-73.

²⁵⁵ Jarsulic, *supra* note 254, at 122.

²⁵⁶ See Sprang, *supra* note 238, at 865; Parker, *supra* note 23, at 376-79.

²⁵⁷ Summers, *supra* note 24, at 85 ("[T]he trend in the last ten years has been toward more employer dominance."); Parker, *supra* note 23, at 350-51 (discussing the scrutiny of employment at will during the 1970s and '80s, but concluding that courts have not developed coherent tort and contract law regarding the doctrine); Kim, *supra* note 17, at 680 ("Despite the many calls for reform, the at-will rule has retained its vitality and, if anything, has been regaining strength in recent years.").

²⁵⁸ Alan B. Krueger, *The Evolution of Unjust-Dismissal Legislation in the United States*, 44 INDUS. & LAB. REL. REV. 644, 658 (1991).

²⁵⁹ Kenneth G. Dau-Schmidt, *Employment in the New Age of Trade and Technology: Implications for Labor and Employment Law*, 76 IND. L.J. 1, 36 (2001);

employment at will has proven so resilient. For employers, there is no more sacrosanct principle of law. Employers wish to operate their businesses as they choose with no regulation by federal or state government. Employment at will is the embodiment of no regulation; legislatures do not pass laws to regulate and courts do not second-guess employers' termination decisions.²⁶⁰

The tempest over wrongful discharge is not likely to abate completely in this century, but there is a noticeable shift toward debate about reforming the law and increasing the protections regarding other terms and conditions of employment. One reason for this shift is the intransigence of the at-will doctrine. Another reason is that workers are less concerned with termination because job tenure is short, currently three and a half years on average.²⁶¹ If employees do not stay in jobs long, job security and employment at will may be of less concern than making the workplace a pleasant, or at least tolerable, environment while they are there.²⁶²

Ultimately, the failed efforts to statutorily abrogate employment at will hold three broad lessons for those who seek to reform the law regarding electronic and genetic privacy invasions, bullying, and other existing and future workplace problems. First, employers do not like to be regulated, and they will oppose employment law, particularly legislation, which provides a concrete target when it is introduced in a

Parker, *supra* note 23, at 404 ("[L]egislative remedies offer little real hope of success.").

²⁶⁰ One judge analogized the hands-off approach of courts to at-will terminations to the courts' no-fault approach to divorces: "Our law chooses not to involve itself with the unfair and subjective treatment leading to these broken at-will relationships in a manner which is somewhat analogous to no-fault divorce." Nicholas v. Allstate Ins. Co., 739 So. 2d 830, 850 (La. Ct. App. 1999) (Caraway, J., dissenting), *rev'd*, 765 So. 2d 1017 (La. 2000).

²⁶¹ *BLS Reports Little Change in Job Tenure Since 1983; Gap Between Sexes Narrowing*, DAILY LAB. REP. (BNA), Aug. 30, 2000 (No. 169), at D1 (reporting Bureau of Labor Standards survey that found median tenure of workers with their current employer is 3½ years); Henry S. Farber, *Trends in Long Term Employment in the United States 1976-96*, in GLOBAL COMPETITION AND THE AMERICAN EMPLOYMENT LANDSCAPE: AS WE ENTER THE 21ST CENTURY, PROCEEDINGS OF NEW YORK UNIVERSITY 52D ANNUAL CONFERENCE ON LABOR 63, 89 (Samuel Estreicher ed., 2000) (the "fraction of workers who were in long-term employment relationships declined significantly between 1979 and 1996, with a disproportionate share of the decline occurring since 1993") [hereinafter GLOBAL COMPETITION].

²⁶² Professor Dau-Schmidt explains: "Just-cause protection is critical only when the incumbent job is clearly better for the worker than other jobs. A worker suffers less damage from being terminated from a particular job that, with high turnover, he probably would have left in a few years anyway." Dau-Schmidt, *supra* note 259, at 36.

legislature. Second, employers will ferociously oppose any law that appears to weaken employment at will.²⁶³ Third, the Montana experience demonstrates an exception to the foregoing principles. If the common law has moved in a direction unfavorable to employers so that employment at will no longer provides reliable immunity in the courts, then employers may support legislation if they can fashion laws that restore them to a more favorable situation.²⁶⁴

IV. RESERVATIONS ABOUT LEGISLATIVE RESPONSES TO EMERGING WORKPLACE PROBLEMS

As the noted scholar Clyde Summers once remarked, Congress, in enacting legislation, does "not move by small steps but rather by sporadic leaps." Those leaps, some might be tempted to add, have not always been preceded by a careful look. Assuming we have reached one of those notable legislative moments in employment ordering, how far and in which direction Congress might be inclined to vault is unclear.²⁶⁵

As discussed above, a legislative approach is only one of the methods used to regulate employment in the United States,²⁶⁶ and only one of the approaches to guaranteeing individual employment rights. Many employee rights advocates have become perhaps too enamored of federal or state legislation as the best means of regulating employers' conduct and protecting employees' rights.²⁶⁷ As the analysis in this

²⁶³ I am not revealing a great mystery here. Employee rights advocates who are proposing reforms that can be made without gutting employment at will, and who can restrain themselves from railing against it, know that the best chance for their proposed law is to walk gingerly around employment at will. See, e.g., Yamada, *supra* note 16, at 531 (arguing that the proposed status-blind harassment law does not substantially impinge upon employment at will – certainly not as much as Title VII does).

²⁶⁴ Professor Alan Krueger has examined the Montana experience and nine other states in which just cause legislation was introduced in the legislature, only to fail. Krueger, *supra* note 258. Professor Krueger concludes that legislation to abrogate employment at will is more likely to be introduced when courts have significantly eroded employment at will through common law theories. *Id.* at 658; Parker, *supra* note 23, at 373.

²⁶⁵ Kohler, *supra* note 32, at 119 (quoting Clyde W. Summers, *A Summary Evaluation of the Taft-Hartley Act*, 11 INDUS. & LAB. REL. REV. 405, 405 (1958)).

²⁶⁶ See *supra* notes 244-47 and accompanying text.

²⁶⁷ Dau-Schmidt, *supra* note 23, at 698 (noting the current preference for legislative regulation); Ehrenreich, *supra* note 23, at 32 n.128 ("In part, the preference for Title VII [rather than torts to address harassment claims] may reflect a scholarly bias in favor of federal law."); Kim, *supra* note 20, at 1500-01 (discussing the desire of advocates of genetic discrimination legislation to claim the moral authority of the civil

section shows, legislation is not the best approach to regulating electronic privacy invaders, genetic discriminators, and bullies.

A. *Political Limitations of a Legislative Approach*

Employers claim they are besieged by legal regulations and potential liability.²⁶⁸ From their perspective, the vaunted employment-at-will doctrine is a mere shadow of its former self, so riddled with exceptions that it cannot be relied upon any longer.²⁶⁹ Although this may sound laughable to students of the law who recognize that the common law incursions of the 1970s and 1980s have receded, employers in their operations may take note of the potential for liability and act as though the legal realm outside employment at will is larger than it actually is.²⁷⁰ Moreover, the changing character of the economy exacerbates this view. If U.S. businesses are to remain competitive in a market of global competition,²⁷¹ they cannot be shackled with more and more employment regulatory laws that impose increasing costs.²⁷² Thus, legislation may become even more difficult to enact in the era of globalization.²⁷³

rights movement); cf. Parker, *supra* note 23, at 370 (labeling wrongful discharge legislation "the deus ex machina of employment law").

²⁶⁸ See, e.g., OLSON, *supra* note 33.

²⁶⁹ See, e.g., Deborah A. Ballam, *Employment-At-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653, 687 (2000) ("[T]he lessons of the current trends in the wrongful discharge area . . . suggest that employers soon will no longer be able to terminate employees for no cause or bad cause. The future of employment-at-will, then, is that it has no future."). But see Dowling, *supra* note 225, at 13-14 ("U.S. employment lawyers say that America's employment at will has eroded away, but theirs is a historical, not an international perspective. By comparison to other countries, employment at will is alive and well in the U.S. . . ."); Estlund, *supra* note 223, at 1669 (arguing that the employment-at-will doctrine "undermines and distorts the operation of [wrongful discharge] laws"); *id.* at 1688 ("The argument that wrongful discharge law has viscerated employment at will is simply overstated").

²⁷⁰ Cynthia L. Estlund, *How Wrong Are Employees About Their Rights and Why Does It Matter?*, 77 N.Y.U. L. REV. 6, 16-17 (2002) (describing view of employment law in which the "shadow of the law" is larger than the law).

²⁷¹ See Dau-Schmidt, *supra* note 23, at 697-98, 702 (discussing this issue as one of the limitations of the legislative-regulation approach to legally protecting workers).

²⁷² See *Survey of Manufacturers Assesses Costs of Complying With Workplace Regulations*, DAILY LAB. REP. (BNA), Jan. 24, 2002 (No. 16), at A1 (detailing survey by George Mason University's Mercatus Center regarding costs of compliance with workplace laws).

²⁷³ See Stewart J. Schwab, *Predicting the Future of Employment Law: Reflecting or Refracting Market Forces?*, 76 IND. L. J. 29, 34 (2001) ("More frequently will the argument be heard and accepted that a country cannot afford extravagant employment-law protections when other countries are only providing efficient protections."); Dau-Schmidt, *supra* note 23, at 697.

From federal and state legislators' perspective, employment legislation is a political lightning rod.²⁷⁴ Although a considerable number of federal employment statutes were passed from 1963 to 1993,²⁷⁵ major federal legislation has not been passed in the decade since. Of the proposed statutes on electronic monitoring and genetic discrimination, the only ones that have been enacted are genetic discrimination statutes at the state level. The electronic monitoring bills are the most revealing example of how hard it is to enact employment law. The PCWA and NEMA would have imposed modest regulations on electronic monitoring of employees,²⁷⁶ but they were bottled up in congressional committees by business groups. The California electronic monitoring notice bill was passed three consecutive years by the legislature and vetoed by the Democratic governor each time.²⁷⁷ If such a *meager limitation* on monitoring cannot become law in *California* with a *Democratic governor*, it is hard to imagine where such a law could be enacted. In sum, taken together, the dearth of federal legislation in the past decade, the aggressiveness of the employer's lobby, and the California experience with electronic monitoring, illustrate that legislative responses to new workplace issues face substantial political hurdles.

B. *Limitations of Minimum Rights Legislation*

The proposed statutes also demonstrate the difficulty of addressing general status-blind harassment and invasions of privacy through legislation. The method does not fit well with the protections that employees need. The general harassment law is a minimum rights law that prohibits a type of employment action, as do the FLSA, the FMLA, the EPPA, and the WARN Act. The problem is that the law does not prohibit something with sufficient specificity to be effective.

Harassment or bullying describes many acts and many degrees of abuse. The anti-bullying law proposed by Professor

²⁷⁴ See *Hill Watchers Foresee Little Activity on the Labor and Employment Law Front*, DAILY LAB. REP. (BNA), Aug. 9, 2001 (No. 153) (quoting Deron Zeppelin, director of government affairs for the Society for Human Resource Management, as saying, "Most members of Congress, believe it or not, do not like to vote on [employment] issues, period.").

²⁷⁵ See *supra* notes 1-15 and accompanying text.

²⁷⁶ See *supra* notes 150-58 and accompanying text.

²⁷⁷ See *supra* notes 159-62 and accompanying text.

Yamada and The Workplace Bullying & Trauma Institute is too vague to be useful – either in giving notice of prohibited conduct and deterring it, or in giving courts a standard for imposing liability.²⁷⁸ To take sexual (and other Title VII) harassment theory and sever the “because of . . .” element is to create a minimum terms statute with a vague standard: Do not be abusive or mean to employees. Minimum terms statutes, other than anti-discrimination statutes, work well when they state specific actions that employers are required to take (pay a minimum wage and overtime) or are prohibited from taking (requesting or requiring a polygraph examination, except under certain circumstances). However, when the laws concern a general type of conduct, they work poorly.

The electronic monitoring bills also are minimum rights laws, but they suffer from just the opposite problem of the anti-bullying law. They are specific enough to be implemented but provide little protection for expectations of privacy. If Congress enacted a law that prohibited electronic monitoring, that would be a substantial privacy protection law. Congress did pass a similar law in another context in 1988 – the EPPA, which essentially prohibited employers from using polygraph examinations.²⁷⁹ However, because of the well-accepted interests of employers, neither Congress nor any state legislature will seriously consider a bill that prohibits electronic monitoring; indeed, there is no need to waste time considering such a law when even notice laws cannot be enacted.²⁸⁰ Consequently, the bills are restricted to requiring notice, and they provide little protection of reasonable privacy interests of employees.²⁸¹ In this respect, the PCWA and NEMA

²⁷⁸ See Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace For Labor and Employment Law*, 48 UCLA L. REV. 519, 611 (2001) (describing Yamada’s proposal as having a standard that is too vague to apply, and characterizing it as “providing broad new conceptions of workplace justice rather than detailed blueprints for legal reform”). It is no answer that it prohibits harassment much as Title VII prohibits sex and other status-based harassment. Anti-discrimination law focuses on the motivation or cause of the adverse employment action. Title VII does not prohibit firing, hiring, or harassing unless it is because of a protected characteristic. In the status-blind harassment proposal, there is no because-of requirement. The difference renders the standard in the anti-bullying law too vague to be used.

²⁷⁹ 29 U.S.C. §§ 2001-09 (2000).

²⁸⁰ Frayer, *supra* note 19, at 873-74 (arguing that a bill that protects privacy interests should not be considered now in view of failure of notice bills).

²⁸¹ See, e.g., Kesan, *supra* note 19, at 300; Wilborn, *supra* note 19, at 851-52; Frayer, *supra* note 19, at 869.

resemble other minimum rights laws that give employees little.²⁸²

There is no quick fix for this flaw, making it all the more fatal. It would be difficult to draft a statute that falls substantively between the notice laws and a prohibition on monitoring—one that balances the interests of employers in monitoring and the privacy interests of employees.²⁸³ Balancing tests are performed in specific factual contexts, and a statute stating that specified interests must be balanced would not provide the certainty or predictability that are the principal objectives of legislation. In short, case law still would develop the practically useful principles.

The genetic discrimination statutes enacted by states and introduced as bills in Congress fit more neatly within the types of legislation that have been enacted in the past. Most take the form of anti-discrimination laws by prohibiting adverse actions because of a protected characteristic.²⁸⁴ The laws also resemble minimum rights laws in that they impose limitations on employers' requiring or requesting that employees submit to genetic testing.²⁸⁵ To the extent that the genetic discrimination laws are minimum rights laws, most legislatures are not willing to prohibit the testing altogether because there are some good reasons why some employers for some jobs under some conditions might need to require genetic testing.²⁸⁶ By mixing a minimum rights approach with an anti-discrimination approach, the laws manage to provide more protection than most minimum rights statutes. The resort to the anti-discrimination paradigm is troubling, however, for other reasons.

C. *Concerns About Anti-discrimination Law*

The concerns in this section have little if any implication for electronic monitoring laws, but they are relevant to status-neutral harassment laws and genetic

²⁸² Summers, *supra* note 24, at 84-85 (stating that "[l]abor legislation in the United States is often half-hearted," and giving as examples several minimum rights laws); Stone, *supra* note 245, at 636-38 (discussing problems with "individual rights/minimum terms model of labor relations").

²⁸³ Wilborn, *supra* note 19, at 852-53, 876.

²⁸⁴ Feldman & Katz, *supra* note 20, at 410-16 (surveying state laws).

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 397.

discrimination laws. The proposed status-blind harassment law is modeled on the harassment law that developed under the federal employment anti-discrimination laws.²⁸⁷ Despite the success of past anti-discrimination laws, and probably because of that success, they are the subject of frequent criticisms. Because of the importance of these laws to our society, we should be very cautious about using the anti-discrimination model for addressing emerging workplace problems. Deploying the method too often dilutes its potency. Instead, the method should be reserved for select instances of compelling public policy to protect discrete groups that historically have been discriminated against.²⁸⁸ By indiscriminately employing the model, the proposed status-blind harassment law and the proposed and enacted genetic discrimination laws could weaken the employment anti-discrimination laws, although that is by no means the intent of their proponents.²⁸⁹

The employment anti-discrimination statutes have been the most significant and most effective statutory labor laws since the NLRA. Title VII, in particular, has generated a monumental shift in employment law and society.²⁹⁰ Anti-discrimination law significantly impinges upon employment at will, carving out a number of bad reasons, or "cause[s] morally wrong,"²⁹¹ for which employers cannot take adverse employment

²⁸⁷ See *supra* notes 209-18 and accompanying text.

²⁸⁸ See, e.g., Kim, *supra* note 20, at 1522-24 (recognizing that a "history of systematic discrimination," one of the most generally accepted reasons for existing anti-discrimination law, does not apply to genetic discrimination).

The importance of the laws and the public policy on which they are founded has not been more eloquently articulated than this:

The anti-employment discrimination laws are suffused with a public aura for reasons that are well known . . . Congress has responded to . . . pernicious misconceptions and ignoble hatreds with humanitarian laws formulated to wipe out the iniquity of discrimination in employment, not merely to recompense the individuals so harmed but principally to deter future violations.

The anti-employment discrimination laws Congress enacted consequently resonate with a forceful public policy vilifying discrimination.

Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1234 (3d Cir. 1994), *cert. granted and judgment vacated*, 514 U.S. 1034 (1995).

²⁸⁹ Professor Yamada specifically rejects Professor Hager's arguments regarding sexual harassment law. See *infra* note 303. Yamada argues that "the enactment of a status-blind hostile work environment law could specially benefit those who are targets of status-based harassment as well." Yamada, *supra* note 16, at 529.

²⁹⁰ Cf. Kim, *supra* note 20, at 1524-25 (discussing early successes of Title VII—"effectuated a change in norms"—but recognizing that it has less impact now).

²⁹¹ See, e.g., Payne v. W. & Atl. R.R., 81 Tenn. 507, 520 (1884).

actions. Indeed, today the federal and state anti-discrimination statutes and the case law developed under them stand as the only significant counterweight to employment at will.²⁹² Overall, employment anti-discrimination law has drastically changed workplaces, employment law, and society in the United States.

Notwithstanding the change wrought by the anti-discrimination laws, it is a precarious success. The biggest success story is also the biggest and most attractive target.²⁹³ There is significant debate, beginning in 1964 when Title VII was enacted and continuing to this day, about the animating theory of the employment anti-discrimination laws. One theory, and the one most often articulated, is the formal equality or status-neutral theory, which posits that the purpose of the laws is to eliminate race, color, sex, etc., from employment decisions.²⁹⁴ The other theory, the antisubordination or "protected-class" theory, holds that in order to achieve equal opportunity in employment, the anti-discrimination laws must eliminate barriers erected to impede groups that historically have been discriminated against.²⁹⁵

Under the protected-class theory, the heart of protection encompasses groups of people who have historically been denied employment opportunities and otherwise discriminated against. Under the formal equality theory, no group, regardless of historical discrimination, is accorded different treatment. Courts have articulated both theories.²⁹⁶ Although the rhetoric

²⁹² One court recognized this when it stated that "discrimination is much more than public policy in Ohio, it is clearly in and of itself an exception to any at-will employment agreement." *Woods v. Phoenix Society of Cuyahoga County*, No. CV-370763, 2000 Ohio App. Lexis 2100, at *6 (Ohio Ct. App. 2000) (quoting *White v. Fed. Reserve Bank*, 660 N.E.2d 493 (1995)).

²⁹³ See, e.g., EPSTEIN, *supra* note 33; OLSON, *supra* note 33.

²⁹⁴ Schwartz, *supra* note 196, at 1775-76; David S. Schwartz, *The Case of the Vanishing Protected Class: Reflections on Reverse Discrimination, Affirmative Action, and Racial Balancing*, 2000 WIS. L. REV. 657 [hereinafter Schwartz, *The Case of the Vanishing Protected Class*]. This theory is closely aligned with, if not synonymous with, the perpetrator perspective on discrimination. See Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052-57 (1978).

²⁹⁵ See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973); Schwartz, *supra* note 196, at 1776 (discussing the antisubordination or protected-class theory of the anti-discrimination laws); Schwartz, *The Case of the Vanishing Protected Class*, *supra* note 294. This theory is closely aligned with, if not synonymous with, the victim perspective on discrimination. See Freeman, *supra* note 294, at 1052-57.

²⁹⁶ Case law recognizing the legality of affirmative action under Title VII is the most dramatic example of the protected-class theory. See, e.g., *Johnson v. Transp. Agency, Santa Clara County*, 480 U.S. 616 (1987); *Steelworkers v. Weber*, 443 U.S. 193 (1979). A recent case exemplifying the status-neutral theory is an age discrimination

of the formal equality theory predominates in the cases, the protected-class theory lives on in both rhetoric and substantive discrimination law. The most prominent examples of anti-discrimination case law supported by one theory but antithetical to the other are the disparate impact theory of discrimination and affirmative action, which both draw from the protected-class theory.²⁹⁷

Other examples exist in distinctions courts make in disparate treatment cases. For example, some courts have stated that for white plaintiffs to establish a *prima facie* case under the *McDonnell Douglas* proof structure, they must produce more evidence of discriminatory motive than African-American plaintiffs.²⁹⁸ Courts in some cases have held that for male plaintiffs to establish a disparate impact claim, they must produce evidence of discrimination that female plaintiffs are not required to produce.²⁹⁹ Many proponents of the formal equality theory are hostile to the protected-group theory, arguing that it uses anti-discrimination law to discriminate.³⁰⁰

There are two fundamental problems with the status-blind harassment law proposal: it has a dangerous theoretical underpinning, and it ventures into a most controversial subject area. As to the first point, status-blind harassment law is grounded on arguments made by proponents of the formal equality theory of employment anti-discrimination law, or perhaps more pointedly, opponents of the protected-class theory. These arguments all rest on the idea that workplace abuse causes a dignitary harm for men as well as women, and the law must protect both equally.³⁰¹ This idea poses a threat to

case in which the court of appeals permitted an age discrimination claim by younger plaintiffs who claimed that the employer discriminated against them on the basis of age in favor of older employees. *Cline v. Gen. Dynamics Land Sys., Inc.*, 296 F.3d 466 (6th Cir. 2002), *cert. granted*, 123 S. Ct 1786 (2003).

²⁹⁷ Schwartz, *The Case of the Vanishing Protected Class*, *supra* note 294, at 662-63, 671-75.

²⁹⁸ See, e.g., *Iadimarco v. Runyon*, 190 F.3d 151 (3d Cir. 1999).

²⁹⁹ See, e.g., *Livingston v. Roadway Express, Inc.*, 802 F.2d 1250 (10th Cir. 1986). See generally Donald T. Kramer, *What Constitutes Reverse or Majority Race or National Origin Discrimination Violative of Federal Constitution or Statutes - Private Employment Cases*, 150 A.L.R. Fed. 1, §2b (1998); see also Timothy K. Giordano, Comment, *Different Treatment for Non-Minority Plaintiffs Under Title VII: A Call for Modification of the Background Circumstances Test to Ensure That Separate Is Equal*, 49 EMORY L.J. 993 (2000).

³⁰⁰ Schwartz, *The Case of the Vanishing Protected Class*, *supra* note 294, at 668-70.

³⁰¹ Mark McLaughlin Hager, *Harassment as a Tort: Why Title VII Hostile Environment Liability Should Be Curtailed*, 30 CONN. L. REV. 375, 383 (1998).

the anti-discrimination laws because it labels all discrimination based on a protected characteristic as wrongful and seeks to equally apply the laws in the same way to all races, sexes and religions, regardless of historical discrimination. For example, no different principles of Title VII anti-discrimination law can apply to whites than African-Americans; plaintiff-friendly presumptions that make sense when applied to African-Americans because of the history of employment discrimination must be applied to whites as well.³⁰² Professor Yamada is aware of this danger nested in his proposal, but awareness is no cure.³⁰³

This danger is one of the reasons that Professor Rosa Ehrenreich proposed keeping the focus of Title VII on the discriminatory nature of sexual harassment and supplementing it with a modified tort of intentional infliction of emotional distress to address the dignitary harms.³⁰⁴ I do not suggest that opponents of the protected-class theory would support status-blind harassment law; instead, they would argue that the only legitimate theory of discrimination, applied to harassment law, should lead to the untenable and infeasible result of law that prohibits employers from being mean or tolerating meanness in the workplace – the general civility code argument, already rejected.

A second danger embedded in the status-blind harassment proposal is that it takes as its model the most controversial theory of anti-discrimination law – harassment.³⁰⁵ The efforts of Professor Catherine McKinnon and others to establish the theory of sexual harassment under Title VII have been well documented.³⁰⁶ Not only could it be argued at the founding of the theory that it should have been left to tort law,³⁰⁷ but the argument has been made since the sexual harassment theory received the imprimatur of the Supreme

³⁰² See, e.g., *Ulrich v. Exxon Co., U.S.A.*, 824 F. Supp. 677 (S.D. Tex. 1993); see generally *Kramer*, *supra* note 299, §2b; *Giordano*, *supra* note 299.

³⁰³ Yamada, *supra* note 16, at 531 (“To say that the distinction between discriminatory and nondiscriminatory harassment is morally untenable is to take a fair point – that harassment of any kind is wrong – too far.”).

³⁰⁴ Ehrenreich, *supra* note 23, at 63.

³⁰⁵ See, e.g., Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 450 (1997); Ehrenreich, *supra* note 23, at 7-8; Kohler, *supra* note 32, at 116.

³⁰⁶ See, e.g., Ehrenreich, *supra* note 23, at 32-36.

³⁰⁷ *Id.*

Court.³⁰⁸ As difficult as it is to explain the theoretical underpinnings of sexual harassment law,³⁰⁹ it does not help to create a status-neutral version.

While adding status-neutral harassment law would not result in the repeal of federal anti-discrimination laws, it unwittingly narrows the theoretical basis of anti-discrimination law and extends one of the most vulnerable theories – harassment. Employment anti-discrimination law can be weakened in many ways without the statutes actually being repealed.³¹⁰ Status-neutral theory and prohibition of ambiguous conduct would make the law seem overly intrusive in the workplace and perhaps make it look frivolous or ridiculous. Opponents would thus argue that the law imposed a general civility code and sanitized the workplace, not only attacking the status-neutral law in particular, but also by implication all anti-discrimination employment laws, thus potentially weakening the entire field.

The genetic discrimination laws are not pure anti-discrimination laws. In the division between minimum rights statutes and anti-discrimination statutes discussed above, they should be classified in part as minimum rights laws, like the Employee Polygraph Protection Act.³¹¹ For example, to the extent that the laws prohibit employers from requiring or requesting that employees submit to genetic testing, they are like the EPPA, a minimum rights statute. Most, however, are not just minimum rights laws because most of the statutes do not simply prohibit genetic testing. To the extent that they prohibit adverse employment actions based on information about genetic conditions, they are more like anti-discrimination laws.³¹² There is nothing wrong with the laws being a cross

³⁰⁸ Hager, *supra* note 301; Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333 (1990).

³⁰⁹ See, e.g., Bernstein, *supra* note 305, at 446; Ehrenreich, *supra* note 23, at 7-15.

³¹⁰ Consider, for example, the progressive narrowing of the disparate impact theory of discrimination under Title VII, culminating in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). At least some of that narrowing subsequently was reversed with the passage of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended at 42 U.S.C. § 1981a (2000) and scattered sections of 2 U.S.C., 16 U.S.C., 29 U.S.C., and 42 U.S.C.).

³¹¹ See Kim, *supra* note 20, *passim* (arguing that genetic discrimination does not fit the anti-discrimination paradigm and is better addressed through privacy law).

³¹² At first blush, one could say they are minimum rights laws just like the EPPA, which also prohibits adverse employment actions on the basis of information obtained from polygraphs. Unlike the information obtained by polygraph tests,

between minimum rights laws and anti-discrimination laws. However, their anti-discrimination aspects are troublesome. Particularly troubling are their departure from prior anti-discrimination law in protecting a discrete, historically discriminated-against group; their kinship with the Americans with Disabilities Act; and their potential redundancy.³¹³

First, unlike other anti-discrimination laws, the genetic discrimination laws do not grow from a history of discrimination against a particular group.³¹⁴ Instead, they are more like the proposed electronic monitoring laws—a reaction to advances in science and technology. The “genetically defective”³¹⁵ have now sped past other candidate groups, such as homosexuals and parents, to be protected by state employment anti-discrimination laws,³¹⁶ and there is a chance that Congress will pass a genetic discrimination law before it passes a sexual orientation anti-discrimination law.³¹⁷ There is no requirement that a group of people who face discrimination in employment must line up and wait their turn for protective legislation, never breaking in line. Still, the history of employment anti-discrimination law in this nation reveals long periods of incubation for civil rights laws in which the record of historical discrimination is publicized, political alliances are forged, and

however, the information obtained by genetic testing is information about a person's inherent characteristics.

³¹³ Professor Kim discusses some of these reasons and others for her rejection of the anti-discrimination model for genetic discrimination. She also argues that some of the practical difficulties with anti-discrimination law, such as the proof structures and doctrines that have made discrimination cases difficult to win and costly to litigate, would be incorporated into genetic discrimination law. See Kim, *supra* note 20, at 1524-28.

³¹⁴ See, e.g., Kim, *supra* note 20, at 1518-20; cf. Peggie R. Smith, *Parental-Status Employment Discrimination: A Wrong in Need of a Right*, 35 U. MICH. J.L. REFORM 569, 604-07 (2002).

³¹⁵ “We’re all mutants . . . everybody is genetically defective.” Brian M. Holt, Comment, *Genetically Defective: The Judicial Interpretation of the Americans with Disabilities Act Fails to Protect Against Genetic Discrimination in the Workplace*, 35 J. MARSHALL L. REV. 457, 457 (2002) (quoting Dr. Michael Kaback); Kim, *supra* note 20, at 1520 (“Even conceptualizing the relevant disadvantaged “group” raises some difficulties, given that each individual's genetic material contains some anomalies that predispose to disease.”).

³¹⁶ There are about 31 states that have passed genetic discrimination laws. See NHGRI Website, *supra* note 145. Only 11 states have sexual orientation discrimination laws. Michael Delikat, *Discrimination Law Update*, in LITIGATING EMPLOYMENT DISCRIMINATION CASES 2002, at 134 (Practicing Law Institute Litig. & Admin. Practice Course Handbook Series, No. H0-00FC, 2002).

³¹⁷ Regarding attempts since 1994 to pass the Employment Nondiscrimination Act (ENDA) concerning sexual orientation, see *supra* note 15. Congress already has considered a genetic discrimination bill, although it has not passed. See *supra* notes 171-76 and accompanying text.

eventually sufficient public policy support and political clout coalesce to provoke passage of the law.³¹⁸ Unless one views the people protected by genetic discrimination laws as disabled individuals, who are protected by the ADA, then this incubation has not happened. Rather, the frightening prospect that science and technology could penetrate deep within our zone of privacy – into our genetic composition – has resulted in the passage at the state level and consideration at the federal level of new anti-discrimination law.

The more deliberative and gradual process behind other anti-discrimination laws served two important purposes. First, it showed that the problems at issue were pervasive and that existing law was inadequate. It is not yet so clear that the problem of genetic discrimination is pervasive enough and that existing law is inadequate to address the problem.³¹⁹ One can think of other groups of people who are discriminated against in employment, including perhaps parents³²⁰ and the physically unattractive.³²¹ However, the existence of such employment discrimination will not prompt anti-discrimination law in the foreseeable future. Second, the slower process behind past anti-discrimination legislation allowed time for political consensus to develop to give the laws the imprimatur of actual public policy, which is currently lacking within the context of genetic discrimination. Although problems of discrimination may exist, it does not necessarily follow that they should be addressed through federal employment anti-discrimination legislation.³²²

³¹⁸ Cf. Smith, *supra* note 314, at 601-12 (discussing factors that determine which classes become protected under law, including immutable characteristics, history of discrimination, job-relatedness of the characteristics, and political power).

³¹⁹ See sources cited *supra* note 36 (arguing that existing law addresses the problem to the extent that there is an actual, as opposed to theoretical, problem).

³²⁰ Federal legislation has been proposed to prohibit employment discrimination against parents, and former President Clinton issued an executive order on the issue. See generally Smith, *supra* note 314, at 587 (discussing the Ending Discrimination Against Parents Act, S. 1907, 106th Cong. (1st Sess. 1999) and Executive Order No. 13,152), 65 Fed. Reg. 26115 (May 4, 2000).

³²¹ See Elizabeth M. Adamitis, *Appearance Matters: A Proposal to Prohibit Appearance Discrimination in Employment*, 75 WASH. L. REV. 195 (2000); Jennifer Fowler-Hermes, *The Beauty and the Beast in the Workplace: Appearance-Based Discrimination Claims Under EEO Laws*, FLA. B.J., Apr. 2001, at 32. The District of Columbia does prohibit employment discrimination based on "personal appearance." D.C. Code Ann. §2-1402.11(a).

³²² See Kim, *supra* note 20 (arguing that the anti-discrimination model is inappropriate for addressing genetic privacy issues); Smith, *supra* note 314 (arguing that anti-discrimination law is not an appropriate vehicle for addressing employment discrimination against parents).

The heavy artillery of employment anti-discrimination law should be used sparingly because it is also the biggest target for opponents of workplace regulation. It is not clear that it was or is needed to combat genetic discrimination in employment.

Another cause for concern with genetic discrimination laws is their relationship with the ADA.³²³ The class of protected persons under genetic discrimination laws resembles the class protected by the ADA; indeed, the EEOC maintains that genetic conditions are covered by the ADA. The ADA has been a controversial law that has generated a surprisingly low number of plaintiffs' victories in the courts.³²⁴ This occurrence has even been described as a "backlash" against the ADA.³²⁵ The open definition of disability has led to many cases in which the plaintiff presented a laughable claim of an impairment that substantially limits a major life activity. Such cases have fueled media depictions of an employment law that permits absurd claims.³²⁶ Even some scholars have been critical of the ADA.³²⁷ Regardless of how one regards the ADA, it has had a tumultuous run since its passage. To the extent genetic discrimination laws are perceived to be similar to the ADA, that perception does not presage a good future.

Finally, and more significant, is the issue of redundancy. The EEOC takes the position that the ADA covers most of the cases that would be covered by a genetic discrimination law, and, in fact, it has filed suit in a case and settled it.³²⁸ Redundancy in employment law is undesirable. It yields uncertainty and unpredictability regarding the state of

³²³ See generally Kim, *supra* note 20, at 1527-32.

³²⁴ See generally Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99 (1999); Linda Hamilton Krieger, *Foreword-Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1, 7-8 (2000).

³²⁵ Symposium, *Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1 (2000).

³²⁶ Krieger, *supra* note 324, at 9-10; Cary LaCheen, *Achy Breaky Pelvis, Lumber Lung and Juggler's Despair: The Portrayal of the Americans with Disabilities Act on Television and Radio*, 21 BERKELEY J. EMP. & LAB. L. 223 (2000). Many of Gerald Skoning's ten "wackiest" employment cases in his annual survey in the *National Law Journal* have been ADA cases. See, e.g., Gerald D. Skoning, *Workplace Wackiness Lives On*, NAT'L L.J., Mar. 25, 2002 at A16.

³²⁷ See, e.g., Samuel Issacharoff & Justin Nelson, *Discrimination With a Difference: Can Employment Discrimination Law Accommodate the Americans With Disabilities Act?*, 79 N.C. L. REV. 307 (2001).

³²⁸ See *supra* notes 95-97 and accompanying text.

the law and excessive litigation.³²⁹ Additionally, a new anti-discrimination statute, if it were under the jurisdiction of the EEOC (and the EEOC has argued for it)³³⁰ would spread more thinly the resources of the already overburdened agency.³³¹

In sum, anti-discrimination employment law is a powerful tool that has done the heavy lifting of declaring and implementing important public policy. Rather than basing our anti-discrimination laws on preventing dignitary harms to insular groups, we have based them primarily on the equal opportunity principle. As influential and successful as the federal employment anti-discrimination laws have been, they are inviting targets for those who oppose regulation of the workplace. No parts of employment anti-discrimination law have been more controversial than harassment law and the ADA. To protect our anti-discrimination laws, we should enact new ones with great reluctance and only after we have examined all options.

D. *Marginalization of Employment Law*

Employment law in the United States is increasingly recognized as a distinct area of law, so much so that it has become compartmentalized.³³² This has some positive and negative ramifications. Broadly, it is good that legally regulating this important facet of life is viewed as worthwhile. On the negative side, employment law has been "marginaliz[ed] – lawyers and courts alike have acted as if employment law were something 'special,' existing outside the bounds of ordinary contract and tort law."³³³ Moreover, employment at will has taken on a substantive life beyond the rebuttable presumption that it is.³³⁴ It occupies so much of the domain of employment law that courts do not apply standard

³²⁹ See Summers, *supra* note 35, at 18-19 (predicting that reconciling overlapping protections would be the most difficult problem in employment law and stating that "[o]ne can scarcely imagine an arrangement better designed to hold out promises to the employee, harass and impoverish the employer, enrich the lawyers, and clog the legal machinery").

³³⁰ EEOC Head Stresses Agency's Need to Handle Genetic Bias Complaints, DAILY LAB. REP. (BNA), Feb. 14, 2002 (No. 31), at A6.

³³¹ Smith, *supra* note 314, at 610-11.

³³² See *supra* note 14 (discussing the emergence of employment law as a distinct area of the law).

³³³ Parker, *supra* note 23, at 352.

³³⁴ *Id.* at 349-52.

contract and tort principles in the same way that they do in other contexts. Writing about wrongful discharge law, Professor J. Wilson Parker argued that lawyers, judges and scholars should stop viewing employment law as a “boutique area of the law” and apply common-law principles to wrongful discharges.³³⁵

The marginalization concern also applies to the problems of electronic monitoring, genetic discrimination, and bullying. Employment law is marginalized, as Parker suggests, but I would modify the view that he attributes to lawyers, judges, and scholars. The area of employment law is dominated by two great pillars: employment at will and statutory employment law (principally employment anti-discrimination law). Thus, absent statutory employment law, courts are not likely to apply common law contract and tort theories and principles in a normal way.³³⁶ An explanation for the atrophy of common law in employment is that courts may be paralyzed by fear that permitting recovery on a contract or tort theory by an employee will encroach too much on the employer prerogatives embodied in employment at will.

An alternative explanation is that courts may take comfort in the insulation provided by the at-will doctrine; they do not have to second-guess employers' decisions because normal contract and tort principles are blunted by employment at will.³³⁷ A good example of this is *Quebedeaux v. Dow Chemical Co.*³³⁸ In that case, one employee physically attacked another, and both were discharged pursuant to the company's no-fighting policy. The plaintiff sued the company under a vicarious liability theory for the battery committed by the co-employee and sought as elements of damages past and future lost wages and benefits resulting from the termination. Under the extended liability principle for intentional torts, as applied by the lower court, a plaintiff may recover for all damages

³³⁵ *Id.* at 354, 359 (“The same law that governs a consumer purchase or personal injury suit should also apply to one's livelihood.”).

³³⁶ Parker says “[t]he heart of trepidation rests with a reluctance to interfere with business judgment—unquestionably a legitimate concern.” *Id.* at 356. Trepidation aside, judicial administration and docket management may better explain courts' reliance on employment at will; it is a convenient tool for dismissing cases.

³³⁷ See *Nicholas v. Allstate Ins. Co.*, 739 So. 2d 830, 849-52 (La. Ct. App. 1999) (Caraway, J., dissenting), *rev'd*, 765 So. 2d 1017 (La. 2000).

³³⁸ 820 So. 2d 542 (La. 2002).

flowing from the tort, whether foreseeable or not.³³⁹ The state supreme court reversed, however, stating that "victim compensation, which is one of the primary policies supporting vicarious liability, must give way to the employment-at-will doctrine, which furthers broader societal policies, such as maintaining a free and efficient flow of human resources."³⁴⁰

Examples of courts' treatments of the torts of intentional infliction of emotional distress and invasion of privacy also demonstrate the skewing of common law principles by employment at will. Courts generally will not find intentional infliction of emotional distress in a case in which the plaintiff was terminated because to do so would provide a theory to circumvent employment at will.³⁴¹ Invasion of privacy cases also show that employers' interests overwhelm employees' interests, as courts conclude that employees do not have reasonable expectations of privacy in the workplace, and even if they do, the invasions are not highly offensive because of employers' interests in workplace management.³⁴² Thus, the marginalization of employment law means that the general common law of torts and contracts provides little recourse to employees. Instead, their recourse is largely in federal and state statutory law. In turn, the preeminence of statutes slowly eviscerates the common law of employment.

But why is this bad, given the preference of many in the legal profession, including scholars, for legislation? First, the day is coming, if it has not already come, when meaningful employment statutes will be difficult, and perhaps impossible, to pass. As discussed above, in the wrongful termination context, statutes cannot be enacted until employers become frustrated with and afraid of the common law.³⁴³ Then, when the statutes are enacted, they often take away the advantages that employees had under the common law. As previously discussed, the past decade has not seen one major federal

³³⁹ *Quebedeaux v. Dow Chem. Co.*, 809 So. 2d 983, 989 (La. Ct. App. 2001), *rev'd*, 820 So. 2d 542 (La. 2002).

³⁴⁰ *Quebedeaux*, 820 So. 2d at 546. Three justices concurred and stated different rationales for reversing, and one expressly stated that he did not think the statement about employment at will was correct. *Id.* at 547 (Calogero, C.J., concurring).

³⁴¹ See *supra* notes 200-02 and accompanying text. See also Austin, *supra* note 200, at 8-12; Gergen, *supra* note 28, at 1702-03.

³⁴² See *supra* notes 114-32 and accompanying text. See also Wilborn, *supra* note 19, at 844-46; Kesan, *supra* note 19, at 302-04; Makdisi, *supra* note 20, at 1019-25.

³⁴³ See *supra* note 264 and accompanying text.

employment law, despite the significance of emerging issues. Even the vapid electronic monitoring notification bills have not been enacted at the federal level or by California.³⁴⁴ Thus, one result of marginalization is that even when legislatures do pass statutes, employees get minimum rights statutes that give them very little. Moreover, it has grown increasingly difficult to enact even those laws.

Second, cordoning off employment law in a realm of federal and state legislation permits courts to reject common law theories with aplomb. Consider, for example, the impact that passage of an electronic monitoring notification statute, which would do very little to protect the privacy rights and dignity of employees, likely would have on the tort of invasion of privacy. If an employer gave the notification required by the statute, courts would find no invasion of privacy regardless of how egregious it was.

Common law tort and contract theories are the stuff of everyday life. With the recognition that work has become perhaps the predominant aspect of life in the United States, it is ironic that we have permitted the law governing that aspect to become so marginalized and entrusted to a single method of regulation.³⁴⁵ However, some scholars have decried a significant role for common law in regulating the workplace.³⁴⁶ Although the common law cannot and should not be the primary means of employment regulation,³⁴⁷ it has historically been a piece of the approach, and it is still needed.³⁴⁸ We have become so enamored of legislation that we seem to have forgotten that there are some matters better left to common law. There are several strong reasons, recounted above, why one should be cautious about new legislation. The employment law of the future will be less responsive to both employer and employee

³⁴⁴ See *supra* notes 150-62 and accompanying text.

³⁴⁵ Cf. Bernstein, *supra* note 39, at 1564. ("As between a new tort and a vigorous display of group-based activism, I admit a bit of a bias in favor of the new tort.")

³⁴⁶ See, e.g., Duffy, *supra* note 201, at 392 ("Civil tort litigation is not an ideal instrument to bring about radical change in the balance of power in the workplace and may well delay the search for effective methods of enforcing workers' rights.")

³⁴⁷ Dau-Schmidt, *supra* note 23, at 700 ("Given its limitations . . . it seems unlikely that adaptation of the common law will ever become the primary means of addressing employee demands in this country.")

³⁴⁸ See Samuel Issacharoff, *Contracting for Employment: The Limited Return of the Common Law*, in GLOBAL COMPETITION, *supra* note 261, at 499, 534 (describing the common law's role as a fallback against voids resulting from decline in collective bargaining and the partial coverage of the anti-discrimination laws).

needs if it abandons the common law approach and accedes to a rigid statutory framework.

V. REINVIGORATING THE COMMON LAW OF THE WORKPLACE

In the 1970s and 1980s courts and scholars actively worked with the common law to address the issue of wrongful discharge. Courts recognized the employment tort of wrongful discharge in violation of public policy, the tort or contract theory (depending on the state) of breach of the covenant of good faith and fair dealing, and various other common law theories of recovery.³⁴⁹ In those regards, the California and Michigan courts were particularly active and creative, and the Montana courts drove employers to support wrongful discharge legislation.³⁵⁰ It is time to reinvigorate the common law in the context of employment to address workplace privacy and harassment issues. New tort theories do not appear to be needed,³⁵¹ but intentional infliction of emotional distress (IIED) and invasion of privacy must be re-evaluated and redefined within the workplace context.³⁵²

A. *Retrofitting Intentional Infliction of Emotional Distress: Substantive*

To adjust IIED to address general harassment in the workplace, courts must lower the bar of "outrageous" conduct in the employment setting. Courts have recognized the tension between the wide berth given to management prerogative

³⁴⁹ See *supra* notes 237-39 and accompanying text.

³⁵⁰ See *supra* notes 253-55 and accompanying text.

³⁵¹ It is tempting to recommend a new tort, which I guess I would call workplace abuse, as Professor Blades did in 1967 with abusive discharge. See *supra* note 238. I resist that temptation for several reasons. First, when Professor Blades proposed the new tort, there was no tort theory that addressed wrongful discharge. Second, Professor Bernstein has discussed the difficulties of successfully creating a new tort. Bernstein, *supra* note 39. Why face the substantial likelihood that a new tort will fail when there are existing torts that can be modified to do the job? Third, to create a new employment-specific tort further compartmentalizes employment law, and as I have explained above, I think that result is undesirable.

³⁵² Going against the grain of favoring new employment legislation, several scholars have recommended common law approaches to workplace issues. Kesan, *supra* note 19, at 322-32 (proposing a contract solution to electronic privacy issues); Ehrenreich, *supra* note 23, at 44-53 (proposing that an adjusted intentional infliction theory supplement sexual harassment law); Makdisi, *supra* note 20, at 1019-25 (suggesting that an adjusted tort theory of invasion of privacy can effectively address genetic intrusions).

under employment at will and the competing idea that workplace environments are a setting in which severe emotional distress is particularly likely to occur. There are several facets of the employment setting that make it a breeding ground for severe emotional distress: a hierarchical organization with authority vested in supervisors; the ever-present threat of discipline or termination and consequent peril of loss of livelihood; a captive audience, in that victims of harassment may not leave work simply because they are distraught; and almost constant contact with and exposure to the same people.³⁵³ Because employment in this nation is so closely identified with one's value and identity in society,³⁵⁴ and because so many needs, such as health insurance and retirement plans, are tied to employment, employees place the well-being of themselves and their families at risk when they go to work.

Courts have struck the balance lopsidedly, resolving the vast majority of the cases in favor of management prerogative rather than the workplace distress factors. In large part, then, it is the threat to employment at will posed by IIED that has caused courts to keep the bar so high. It is one thing, however, for courts to say that not every termination gives rise to an IIED claim, and another to say that no case in which harassment ends in termination or constructive discharge can give rise to an IIED claim. Because employees have so much at risk in their jobs and are subject to so many pressures, Professor Rosa Ehrenreich recommends that the workplace be considered "an inherently aggravating factor" in IIED claims.³⁵⁵ Her suggestion, thus, is for courts to restrike the balance on IIED in the workplace, giving greater weight to the characteristics of the workplace that make it more stressful than other settings, and less weight to the need of employers to manage the workplace through some level of mental distress.

While the employment-at-will concerns that courts have about IIED in the workplace will render most courts reluctant to articulate an "inherently aggravating factor" standard, Ehrenreich has indicated the direction in which courts should move and provided the supporting rationale. Indeed, a straightforward application of tort law principles to

³⁵³ See, e.g., Ehrenreich, *supra* note 23, at 45-52.

³⁵⁴ *Id.* at 49. See also *supra* note 37.

³⁵⁵ Ehrenreich, *supra* note 23, at 49.

employment would suggest that courts should lower the threshold of outrageous conduct in the workplace. Early cases applied lower standards for outrageous conduct, permitting recovery for insults in cases involving customers interacting with public utilities and common carriers,³⁵⁶ and this was later expanded to innkeepers.

Many of the same reasons for recognizing a special relationship between the foregoing entities and their customers also apply to employers and employees.³⁵⁷ Thus, regardless of whether courts are willing to expressly state that employment is an "inherently aggravating factor," consistent with established tort principles, courts can lower the standards for the elements of IIED in the workplace. Moreover, although this Article does not advocate for a general harassment statute, courts could fashion a more useful and appropriate standard for outrageous workplace conduct by using protected-class harassment cases to inform the types of conduct that might be considered outrageous. Thus, courts could look for guidance to cases of conduct found to be severe or pervasive enough to constitute sexual, racial, religious, national origin, age, or disability harassment.

B. Retrofitting Invasion of Privacy: Substantive

Invasion of privacy (principally intrusion on seclusion) is a flexible theory that can address electronic monitoring and genetic invasions.³⁵⁸ Regarding genetic discrimination, tort theory could augment the coverage already provided by the Americans with Disabilities Act and state genetic discrimination laws. For electronic monitoring, invasion of privacy should be adjusted to play a central role in light of the failure of the notice bills to be enacted, and their inadequacy to provide meaningful protection even if enacted.

The most pressing need is for courts to recognize that employees can have privacy expectations in the workplace by prohibiting employers from destroying privacy expectations

³⁵⁶ RESTATEMENT (SECOND), *supra* note 115, § 48; DOBBS, *supra* note 117, § 303.

³⁵⁷ See, e.g., *Bodewig v. K-Mart, Inc.*, 635 P.2d 657, 660-61 (Or. Ct. App. 1981), *rev. denied*, 644 P.2d 1128 (Or. 1982) (permitting recovery for reckless infliction of emotional distress because employer-employee is a "special relationship" involving an imbalance of power).

³⁵⁸ See Makdisi, *supra* note 20, at 1004.

through policies and statements. Until that change occurs, unrealistic contract notions that the employer and employee have agreed upon little or no expectation of privacy will continue to undermine the tort theory.³⁵⁹ In employment, negotiation and agreement on privacy rarely occurs, and tort law should recognize a duty of employers to respect employees' reasonable expectations of privacy and not permit employers to disclaim it. Although it may take some work by courts and perhaps trumping of contract law by tort law, there are general tort principles that courts could apply to halt employer eviscerations of employee privacy expectations. For example, duress or coercion may render consent ineffective.³⁶⁰ An alternative or additional ground for rendering consent an ineffective defense could be that the invasion exceeded the scope of the consent.³⁶¹

If a court chooses to emphasize the contract aspects of the privacy tort, there are other contract rationales under which courts could hold unenforceable employees' agreements to waive privacy rights. For example, a waiver may be unenforceable as violating public policy when there is a significant disparity of bargaining power between the parties.³⁶² Another tenet requires that waivers be knowing and voluntary.³⁶³ On the other side of the Catch-22 of intrusion upon seclusion, if an employee refuses to permit the intrusion, courts can find that attempts to intrude satisfy the intrusion requirement based upon the power imbalance and the effect on the employee of the attempted intrusion.³⁶⁴

C. *Retrofitting Both Intentional Infliction of Emotional Distress and Invasion of Privacy: Procedural*

There are two important procedural changes that should be made to the applicable torts. First, for both IIED and invasion of privacy, the most necessary adjustment is for courts

³⁵⁹ Spencer, *supra* note 56, at 870.

³⁶⁰ RESTATEMENT (SECOND), *supra* note 115, § 892B(3).

³⁶¹ *Id.*; see also RESTATEMENT (SECOND), *supra* note 115, § 892A(4).

³⁶² See, e.g., Doe v. Smithkline Beecham Corp., 855 S.W.2d 248, 253 (Tex. Ct. App. 1993), *aff'd as modified*, 903 S.W.2d 347 (Tex. 1995).

³⁶³ Estlund, *supra* note 270, at 23-27.

³⁶⁴ See, e.g., Phillips v. Smalley Maintenance Servs., Inc., 435 So.2d 705, 709 (Ala. 1983) (holding that acquisition of information from a plaintiff is not a requisite element of intrusion upon solitude).

to refrain from granting so many summary judgments³⁶⁵ and to let close cases proceed to trial. Juries have sufficient sympathy for employees who are harassed and subjected to invasions of privacy.³⁶⁶ Consider, for example, the Kentucky case, *Stringer v. Wal-Mart Stores, Inc.*,³⁶⁷ in which four Wal-Mart clerks were discharged for eating candy and nuts from damaged packages. Wal-Mart claimed the employees had violated a store pilferage policy, but the employees claimed they were following an unwritten store policy whereby such food was left in the employee lounges for consumption. The plaintiffs sued for IIED, invasion of privacy and slander.³⁶⁸ A jury awarded each plaintiff five million dollars in compensatory and punitive damages.³⁶⁹

The call for fewer summary judgments in this context is not merely an ends-oriented approach. It is by no means clear that the two elements on which IIED and invasion of privacy claims are routinely dismissed on summary judgment – outrageous conduct and expectation of privacy, respectively – should be decided by courts as a matter of law. Because both outrageous conduct and reasonable expectation of privacy invoke societal standards, these questions, like breach in negligence cases, are appropriate for jury resolution, and only rarely should be decided by courts.

Additionally, diverting more employment cases to alternative dispute resolution methods could be a partial panacea for the courts' tendency to dismiss employment tort cases on summary judgment. It is possible that arbitrators and

³⁶⁵ See, e.g., Gergen, *supra* note 28, at 1726-33. Professor Beiner makes this argument regarding sexual harassment cases. See Theresa M. Beiner, *Let the Jury Decide: The Gap Between What Judges and Reasonable People Believe Is Sexually Harassing*, 75 S. CAL. L. REV. 791, 791-95 (2002).

³⁶⁶ See Gergen, *supra* note 28, at 1736 (noting that juries are correctly perceived to be biased against employers in tort cases); Schmidt v. Ameritech Ill., 768 N.E. 2d 303 (Ill. App. Ct. 2002) (overturning award of \$5 million in punitive damages to employee in invasion of privacy claim where employer examined home telephone records of employee). Cf. Beiner, *supra* note 365, 842-46.

³⁶⁷ No. 95-CI-00228 (Ky. Cir. Ct., judgment entered Jan. 19, 1999), reported in, *Wal-Mart Ordered to Pay \$20 Million to Four Store Clerks Fired for Eating Candy*, 14 Individual Employment Rights (BNA), Jan. 26, 1999 (No. 14), at 1.

³⁶⁸ See also Roth v. Farner-Bocken Co., No. 98-815 (S.D. Cir. Ct. Jan. 2, 2002), reported in *South Dakota Jury Awards \$525,000 to Man Who Claims Employer Opened Personal Mail*, DAILY LAB. REP. (BNA), Feb. 5, 2002 (No. 24), at A6.

³⁶⁹ *Ex-Wal-Mart Staff Awarded \$20 Million in Kentucky Lawsuit*, WALL ST. J., Jan. 18, 1999, at A10; *Wal-Mart Ordered to Pay \$20 Million to Four Store Clerks Fired for Eating Candy*, 14 Individual Employment Rights (BNA), Jan. 26, 1999 (No. 14), at 1.

mediators may be more receptive than judges to claims of workplace abuse.³⁷⁰

D. Hope for Common Law Change and the Obstacle of Rigid Courts

Is there any hope that courts will make any of the above substantive and procedural changes in their approaches to the tort theories?³⁷¹ Many object that the courts are too rigid to adjust the common law torts to address these problems.³⁷² Several responses are in order. First, the difficulty of effecting change is no excuse to stop advocating for change.³⁷³ All that is needed is time and pressure.³⁷⁴ The evolution of the common law is often slow, but it does evolve to address new challenges and reflect society's evolving values.³⁷⁵ General recognition in tort of recovery for emotional distress injuries has taken place largely within the last forty years, and mostly within the past thirty.³⁷⁶ Because of the limitations of legislation and the value of a common law approach to these problems, it is no answer to dismiss the common law because of the difficulty and pace. As with many things in life, the fastest and seemingly easiest approach is not necessarily the best.

³⁷⁰ See, e.g., *Panel Orders Dow Chemical to Reinstate a Dozen Workers Fired for E-Mail Abuse*, *supra* note 66 (arbitration panel ordered reinstatement of 12 employees because of disparate treatment under e-mail policy); *Oklahoma Fixture Co. and Carpenters, Local 943, 01-02 Lab. Arb. Awards (CCH)*, ¶ 3912 (July 7, 2001) (arbitrator awarded reinstatement to employee fired for insubordination because employee was provoked by supervisor's bullying) (citing Yamada, *supra* note 16). An arbitrator awarded a terminated employee \$200,000 for intentional infliction of emotional distress, but the district court vacated the award in *Hughes Training, Inc. v. Cook*, 254 F.3d 588 (5th Cir. 2001). The arbitration agreement established a broader standard of review—the judicial standard of review—than normally applies to arbitral awards.

³⁷¹ See Wilborn, *supra* note 19, at 854 (a common law approach to privacy issues would require "considerable judicial activism," and courts do not appear willing to engage in such); Kesan, *supra* note 19, at 322 (suggesting that courts may step in to limit employer monitoring, but it is unlikely based on past record).

³⁷² See, e.g., Ehrenreich, *supra* note 23, at 55-56 (addressing the rigid courts objection).

³⁷³ *Id.*

³⁷⁴ See *THE SHAWSHANK REDEMPTION* (Columbia Pictures 1994).

³⁷⁵ Ehrenreich, *supra* note 23, at 55-56; Cf. Bernstein, *supra* note 39, at 1565 ("The measured, respectful movement of a new tort will always appear feeble to activists . . .").

³⁷⁶ See generally Nancy Levit, *Ethereal Torts*, 61 GEO. WASH. L. REV. 136 (1992). Cf. Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463 (1998).

A second reason to have hope for the common law changes discussed above is the influence of existing statutory law on the tort theories. Both IIED and invasion of privacy became more successful tort theories after the emergence of Title VII harassment law. The influence of harassment law under Title VII has made IIED a more successful theory in the employment context.³⁷⁷ The ADA, with its limitations on pre-employment medical testing and other limitations on the dissemination and use of information about disabilities, should bolster the invasion of privacy tort in the context of genetic discrimination. Although there is not as much federal law relevant to electronic monitoring, a recent case under the Federal Wiretap Act indicates that the case law under federal statutes could strengthen the privacy tort with respect to electronic monitoring. Specifically, in *Smith v. Devers*,³⁷⁸ a federal district court reversed the granting of summary judgment on claims under the Federal Wiretap Act and the tort of invasion of privacy where an employer taped private telephone conversations of an employee.

A third reason to hope and believe that courts will make adjustments in the torts is the change in IIED in Texas in recent years. Texas is one of the strongest at-will states in the nation,³⁷⁹ but its courts have permitted the development of IIED in the workplace. The Texas Supreme Court recognized IIED in a workplace resulting in resignations in *GTE Southwest, Inc. v. Bruce*.³⁸⁰ Practitioners predicted that the case would make it more difficult for employers to obtain summary judgments on IIED claims.³⁸¹ A survey of Texas cases appears to support this prediction, although employers still win quite a few.³⁸² In one of the most conspicuous of the post-*GTE Southwest* IIED cases in

³⁷⁷ See *supra* notes 27-28 and accompanying text.

³⁷⁸ 2002 WL 75803 (M.D. Ala. Jan. 17, 2002).

³⁷⁹ Cf. *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985) (recognizing narrow public policy exception to employment at will); *Montgomery County Hosp. Dist. v. Brown*, 965 S.W.2d 501 (Tex. 1998) (discussing the specificity of statement required for Texas courts to find an employment contract of definite duration).

³⁸⁰ 998 S.W.2d 605 (Tex. 1999). For discussion of the case and consideration of both prior Texas case law involving IIED in the workplace and the ramifications of the *GTE Southwest* case on future workplace claims, see Dudley G. Jordan, *Expanding the Potential for Recovery of Mental Anguish Damages in the Employment Setting: A Case Note on GTE Southwest, Inc. v. Bruce*, 52 BAYLOR L. REV. 461 (2000).

³⁸¹ Earl M. Jones, III, et al., *Employment and Labor Law*, 54 SMU L. REV. 1307, 1332 (2001).

³⁸² *Id.* at 1332-36.

the Texas courts, an appellate court affirmed an award of approximately ten million dollars, including eight million dollars in exemplary damages, to a former employee who sued for sexual harassment and IIED.³⁸³

Even more recently, a Connecticut case indicates that some courts are becoming more receptive to IIED claims in the workplace setting. In *Benton v. Simpson*,³⁸⁴ five plaintiffs sued their manager for IIED based on his temper tantrums, profanity-laced tirades, and physical acts such as pounding on file cabinets. The plaintiffs testified that the defendant made statements such as, "You women make me sick, you're like a cancer."³⁸⁵

The plaintiffs requested a prejudgment remedy to secure a monetary award in the case. The trial court conducted a hearing to determine whether there was probable cause to believe that the plaintiffs would prevail. Remarkably, the trial court determined that there was probable cause and ordered an attachment on the equity in the defendant's house in the amount of one hundred thousand dollars. Affirming, the appellate court commented on the outrage element of the tort: "[B]ecause the plaintiffs and defendant worked in close proximity to one another and because of the nature of the employment relationship, it was difficult for the plaintiffs to avoid continued interaction with the defendant."³⁸⁶

Thus, common law tort theories can be modified to effectively address electronic monitoring, genetic discrimination, and general harassment. Critics of a common law approach are understandably skeptical that courts will make the needed adjustments. However, as described above, there is reason to believe that the torts will evolve to reflect society's values in addressing these problems. Although the pace of common law change is slower, the benefits should be worth the wait.

³⁸³ *Hoffman-La Roche, Inc. v. Zeltwanger*, 69 S.W.3d 634 (Tex. App. 2002). The *Hoffman-La Roche* case involved sexual harassment, however, and the willingness of courts to permit recovery does not always translate to status-neutral harassment. For example, the Louisiana Supreme Court recognized that sexual harassment might be considered outrageous in *Bustameto v. Tucker*, 607 So. 2d 532 (La. 1992), but it reversed a judgment for a man who was the victim of a pattern of harassment in *Nicholas v. All-State Ins. Co.*, 765 So. 2d 1017 (La. 2000).

³⁸⁴ 829 A.2d 68 (Conn. App. Ct. 2003).

³⁸⁵ *Id.* at 71.

³⁸⁶ *Id.* at 74.

E. *The Relationship Between Workers' Compensation Law and a Tort Approach*

Some point to state workers' compensation laws as a potential problem for tort law solutions in the employment context. The concern is that exclusivity provisions in many states' laws render employers immune from tort lawsuits.³⁸⁷ However, this should not be a significant impediment to a tort-based approach. Either tort law or workers' compensation law is available to provide a remedy, and under some workers' compensation laws, both will be available. Most notably, under many state compensation laws, the exclusivity provision does not apply to intentional torts,³⁸⁸ allowing a plaintiff suing for IIED³⁸⁹ or invasion of privacy³⁹⁰ to recover in tort.

If a plaintiff is in a jurisdiction that does not have an exception for intentional torts or the plaintiff is unable to prove an intentional tort, the plaintiff's tort claim may still survive. Many states have heightened requirements for workers' compensation coverage of mental injuries caused by mental stress.³⁹¹ While this seemingly inures to the benefit of the employer, it can have an ironic effect. If the injured employee cannot satisfy the heightened requirements for workers' compensation coverage, then the exclusivity provision may not apply (i.e., no coverage, no exclusivity), and the employee may be able to sue for negligence.³⁹²

A second role for workers' compensation law would be as a factor for courts to use in evaluating conduct to determine whether it is sufficiently outrageous under an IIED claim or highly offensive under an invasion of privacy claim. If courts find that no workers' compensation remedy is available, that should be a basis for lowering the bar for tort recovery. This is justified in view of the history of workers' compensation laws in relation to tort law. Workers' compensation laws were adopted to provide a remedy for workplace injuries when tort defenses

³⁸⁷ See, e.g., Ehrenreich, *supra* note 23, at 56-57 (discussing this problem with a torts approach to workplace injuries).

³⁸⁸ 1 MODERN WORKERS COMPENSATION § 102.13 (Clark Boardman Callaghan 1993).

³⁸⁹ PERRITT, *supra* note 115, at § 8.13.

³⁹⁰ See, e.g., Karch v. BayBank FSB, 794 A.2d 763 (N.H. 2002).

³⁹¹ 1 MODERN WORKERS COMPENSATION, *supra* note 388, § 109.29.

³⁹² Richardson v. Home Depot U.S.A., 808 So. 2d 544 (La. Ct. App. 2001); Grimm v. US West Communications, Inc., 644 N.W.2d 8 (Iowa 2002).

barred recovery. The interaction between tort law and workers' compensation always has been to provide a remedy for workers injured in the workplace.

The role of the workers' compensation laws when they were first enacted in the early 1900s was to provide benefits in cases in which tort recoveries were virtually impossible.³⁹³ Then, lawmakers were concerned with rampant physical injuries resulting during the rise of industrialism. Now, as mental distress becomes a growing concern because of bullying, electronic monitoring, and genetic testing, a balance can be struck between the workers' compensation law and tort law to provide coverage for injuries.³⁹⁴ Accordingly, one can see workers' compensation laws not as a problem or obstacle in tort responses to employment law issues, but as part of a solution that adjusts existing and malleable tort theories to address emerging workplace issues.

VI. CONCLUSION

There are a number of problems with legislative solutions to emerging workplace problems, particularly invasion of privacy, genetic discrimination, and bullying. The epoch of reliance on statutory responses to employment problems has had two unfortunate consequences. First, the common law, which has been such an important part of the law regulating people's daily lives, has lost ground in one of the major relationships of modern life: work. Second, and relatedly, when there is no employment statute to act as a check, the dominance of employment at will and the related notions of employer power and prerogative skew common law doctrine and analysis.

Modern common law solutions can correct these distortions. True, common law will not eliminate harmful conduct in the workplace as fast as federal statutes, but federal statutes creating meaningful and worthwhile protections of employees' dignity are not going to be enacted. Moreover, it is

³⁹³ See, e.g., ARTHUR LARSON, *LARSON'S WORKMEN'S COMPENSATION: DESK EDITION* §§ 4.30 & 5.20 (1982).

³⁹⁴ For example, a Louisiana state court, noting that there was no workers' compensation coverage for an employee's mental distress injuries, permitted the negligent infliction claim to go forward, noting that an employer's duty to provide a safe work place includes a duty to avoid causing a "mental breakdown." *Richardson*, 808 So. 2d at 550 (La. Ct. App. 2001).

not clear that they should be. There are problems of fit, timing, and overuse of legislation. One of the positive characteristics of the common law is that it can and does adjust to reflect society's values.³⁹⁵ That tort law would not impose liability in as many cases as some employee rights advocates wish is not necessarily bad.³⁹⁶ The Supreme Court has been adamant that not even Title VII is a general civility code that will address every unpleasantry.³⁹⁷

Writing about IIED in the context of wrongful discharges, Professor Mark Gergen recognized its rare successes and defended its use for egregious cases.³⁹⁸ Gergen remarked on an important aspect of the role for the common law in employment cases. In areas in which the conduct is difficult to define and there are important competing interests such that the society is not willing to pass meaningful legislation, tort law and contract law should fill the breach. The common law patrols the ambiguous border of acceptability, catching the cases that clearly cross over. What is needed now to improve American workplaces is for the common law to catch more cases of harassment, electronic monitoring, and genetic discrimination. That can and should be done without new legislation.

Federal legislation was needed to deal with discriminators in the last century. It is not yet clear that controlling electronic and genetic privacy invaders and bullies requires more legislation. With common law filling some gaps, over time society will discover whether legislation is needed and appropriate. Until then, however, what we need is a revitalized common law of the workplace.

³⁹⁵ See, e.g., Marshall S. Shapo, *In the Looking Glass: What Torts Scholarship Can Teach Us About the American Experience*, 89 NW. U. L. REV. 1567, 1569 (1995) ("Tort jurisprudence is a relatively accurate reflector of American society's basic principles for microgovernance.").

³⁹⁶ See Ehrenreich, *supra* note 23, at 31 n.127 (observing that Professor Austin "casts her net too broadly" in trying to pull within the ambit of IIED workplace conduct that is merely unpleasant); Kim, *supra* note 17, at 691 (arguing that not every violation of privacy should have a legal remedy because "[s]ome intrusions are so trivial that they will be experienced by most people as mere annoyances or rudeness.").

³⁹⁷ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

³⁹⁸ Gergen, *supra* note 28, at 1737-39.