ON BEYOND DRUG TESTING: EMPLOYER MONITORING AND THE QUEST FOR THE PERFECT WORKER

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I. INTRODUCTION

The litany is familiar; only the specific problems change. Drug and alcohol abuse, it is said, costs American industry $100 billion in reduced productivity per year.1 Employee theft, it is estimated, amounts to billions of dollars annually.2 Occupational injuries and diseases account for lost working time and increase employer costs.3 Health insurance costs have skyrocketed.4 Then there is AIDS, a problem of enormous consequence for all of society, including the workplace.5

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2. See, e.g., Craver, The Inquisitorial Process in Private Employment, 63 Cornell L. Rev. 1, 2 (1977) ($12 to $40 billion per year); Spelfogel, Surveillance and Interrogation in Plant Theft and Discipline Cases, in PROCEEDINGS OF NEW YORK UNIVERSITY 21ST ANNUAL CONFERENCE ON LABOR 171, 171 (T. Christensen ed. 1969) ($2-$4 billion per year).
4. See, e.g., Frumkin, Health Insurance Trends in Cost Control and Coverage, 109 MONTHLY LAB. REV. 3 (1986) (annual cost of employer-financed group health insurance rose from $51.3 billion in 1979 to $96.9 billion in 1984); Kramon, Insurance Rates for Health Care Increase Sharply, New York Times, January 12, 1988, at 1, col. 6 (health insurance premiums rose by 10 to 70%, and Medicare premiums by 38.5%).
5. The Surgeon General estimates that 1.5 million individuals in the United States are infected with the AIDS virus. Koop, Surgeon General's Report on Acquired Immune Deficiency Syndrome, 256 J. A.M.A. 2784 (1986). Although only a small percentage of these individuals have contracted the full-blown disease, public health officials warn that it should be assumed that once a person has been infected with the virus, he or she is forever capable of transmitting it to others. See Merritt, Communicable Disease and Constitutional Law: Controlling AIDS, 61 N.Y.U. L. Rev. 739, 744-45 (1986). AIDS is not spread by casual contact,
As if this were not enough, aggressive foreign competition and the burgeoning trade and budget deficits pose enormous challenges to business and government to find ways to increase the productivity of our economy.

Is it any wonder companies feel the need to do something to cope with all of these matters? If the zeal with which both business and government have embraced drug testing is any indication, the future promises increasing use of science and technology to regulate and control the workplace and to eliminate troublesome or unproductive individuals. In the case of drug testing, the federal government's enthusiastic propaganda campaign undoubtedly has encouraged the adoption of drug screening programs by some employers who otherwise might not have done so. Certainly, the government's efforts have muted public objections to these programs. Even without Presidential support, however, drug testing probably would still have been popular among employers. As long as drug abuse is perceived as a significant problem in the workplace, employers will try to find measures to deal with it. The ready availability of relatively inexpensive drug screening tests just makes the adoption of these measures easier.6

In any event, it is only natural that employers will implement selection and supervision devices that hold out some promise, however slim, of reducing costs and improving productivity. Thus, various selection devices that purport to identify workers who may be costly to a firm for one reason or another, such as polygraph examinations, drug tests, AIDS tests, and other forms of medical and genetic screening, are in common use by many employers. One source reports that in 1982 more than one million applicants and employees were subjected to lie detector tests as a condition of employment.7 The number

6. Interestingly, employment drug tests rarely screen for alcohol use, even though alcohol is the most commonly abused drug. Cf. New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (employer maintained a treatment program for alcohol-dependent employees, but had a blanket rule forbidding the employment of persons who were maintained on methadone). The reason for this omission may be that alcohol abuse is not yet perceived by employers as a workplace problem. Some would call this societal hypocrisy. See Wisotsky, The Ideology of Drug Testing, 11 Nova L.J. 763 (1987).

of Fortune 500 companies requiring drug tests increases with each new report. One company has even instituted pulmonary function tests to ensure compliance with its rule prohibiting employees from smoking at any time, even when they are not at work. Workplace surveillance, designed to observe on-the-job behavior and detect rule violations, is sometimes carried out by closed-circuit television and listening devices that allow the monitoring of telephone calls. The Office of Technology Assessment reports that equipment and software for telephone call accounting, which allows employers to monitor the pattern, as well as the content, of employees' telephone calls, are the fastest growing segment of the telecommunications industry.

There are even reports of companies that use biometric identification, such as hand geometry or retinal patterns, which are purported to be as unique as fingerprints, to control access to sensitive areas or simply to verify identity.

One of the most popular of the new technologies is the computerized supervisory system, a form of computer software that provides continuous and extensive monitoring of the work performed by video display terminal ("VDT") operators and other employees who use computers. With computer monitoring, supervisors can learn how every minute of the operator's working day was spent; the system can be programmed to provide such information as the number of words, and even key strokes, entered per minute, the number of mistakes made, the number of customers served and the length of each transaction, and the number and duration of breaks taken. Using this technology, an employer can immediately determine each worker's individual level of production. The extent of the use of computer monitoring is not known, although one source estimates that six million office workers are currently monitored by computers.

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12. Office of Technology Assessment, supra note 10, at 1. A study of 110 companies using VDT systems found that almost all collected some quantitative data on employee perform-
At first glance computer monitoring may seem to affect only clerical work, but it can be instituted for any job that involves the use of computers or machines that can be computerized. As jobs become increasingly technological in nature, more of them will be potential subjects of some form of computerized supervision. Although the ultimate extent of technological development in the area of employee selection and supervision is difficult to predict, it is clear that the computer has made it possible to accumulate, sort, store indefinitely, and retrieve at any time vast quantities of information about individuals.

In this article I assume that computer monitoring and other methods of obtaining precise, individualized information about employees and their work performance will eventually become a routine part of many American workplaces. Although there are issues unique to certain methods of testing, observation, and monitoring of employees, such as the invasion of privacy questions raised by drug testing, my purpose is to discuss in a general fashion the legal and societal implications of the implementation of technology-based monitoring.

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14. This article will discuss statutory and common law restrictions on the use of various monitoring devices, with the assumption that employers apply the devices to all workers in a job category, or at least that they do not make selections on the basis of factors forbidden by existing laws. Surveillance of union activities can violate section 8(a)(1) of the National Labor Relations Act. See, e.g., Arrow Automotive Indus., 258 N.L.R.B. 860 (1981), enforced mem., 679 F.2d 875 (4th Cir. 1982). Disparate use of testing or monitoring devices can be a violation of Title VII of the Civil Rights Act of 1964, see, e.g., Howard v. Roadway Express, Inc., 726 F.2d 1529 (11th Cir. 1984) (illegal for employer to require black applicants, but not white applicants, to take polygraph tests), as can the use of policies that have a disproportionate effect on members of a protected group, see New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (no methadone rule had a disparate impact on blacks and Hispanics, but was justified by defendant's goals of safety and efficiency). Some medical and genetic screening may violate laws that prohibit discrimination against the handicapped. See School Bd. v. Arline, 107 S. Ct. 1123 (1987) (school teacher with a history of tuberculosis is a "handicapped individual" within the meaning of section 504 of the Rehabilitation Act of 1973; case remanded for determination of whether she was "otherwise qualified"); see generally B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (2d ed. 1983); M. ROTHSTEIN, MEDICAL SCREENING OF WORKERS (1984).
II. THE EMPLOYER INTEREST IN MONITORING

It is axiomatic that employers have legitimate interests in the functioning of the work force and the operation of the workplace. These interests can be grouped into three overlapping categories: production, discipline, and safety. To the extent possible, employers seek to minimize lost or idle work time, prevent pilfering, spoilage, or other forms of malfeasance, and prevent costly illnesses and injuries. The ultimate goal of all employment selection, control, and monitoring techniques is to find the "right" person for each job and to obtain the maximum level of efficient production from him or her, all at the lowest possible cost to the employer.

Employers generally rely on some form of pre-employment screening to measure an applicant's ability or aptitude for a particular job and on supervisory observation to evaluate actual job performance. Pre-employment screening often has been crude at best, and traditional forms of supervision provide only sketchy and periodic information about performance. Newer forms of monitoring technology perform similar functions, but purport to do so in a more accurate way. For instance, devices such as drug testing play a role similar to traditional pre-employment tests; they are thought to be predictive in nature. Drug testing is necessarily based on an assumption that the future job performance of individuals who have used drugs at some point in the past (and therefore test positive) may be impaired. A refusal to hire an applicant who tests positive is based on the assumption that his or her performance will be impaired by drug use. Drug tests are also used as disciplinary devices for current employees.

15. See, e.g., O'Connor v. Ortega, 107 S. Ct. 1492, 1502 (1987) (government's interest as an employer is in "the efficient and proper operation of the workplace").

16. Although there are certainly examples of employer monitoring undertaken for the "wrong" reasons, see, e.g., Morris v. Coleman Co., 241 Kan. 501, 738 P.2d 841 (1987) (supervisor spied on female employee and reported that she had gone on an overnight trip with a male coworker), the particular justification for the use of monitoring may be irrelevant. What matters is the capability of gathering and storing information. Once that information has been collected, it is virtually impossible to regulate the uses to which it may be put.

17. Many of the written tests challenged in early Title VII litigation sought information totally unrelated to the job for which the test was given. The test at issue in Vulcan Soc'y v. Civil Serv. Comm'n, 490 F.2d 387 (2d Cir. 1973), which was administered to applicants for employment with the New York City Fire Department, asked the definitions of words such as "attest," "luminous," and "deficit." Id. at 397 n. 12; see also Bartholet, Application of Title VII to Jobs in High Places, 95 HARV. L. REV. 945, 991 n.151 (1982) (giving other examples of pre-employment tests that "demanded knowledge that a promising candidate had no reason to possess").

18. See Rothstein, Screening Workers for Drugs: A Legal and Ethical Framework, 11 EMPLOYEE REL. L.J. 422, 425 (1985) ("[I]t is reasonable to assume that employees with detectable prior drug exposures are more likely to be impaired by drugs in the future than are employees with no detectable prior exposure.")
Presumably, current employees who test positive on a random or blanket drug screen have been performing at a satisfactory level; otherwise, the employer would already have disciplined or fired them.\(^\text{19}\) Suddenly, a positive result changes the employer’s perception of the employee and creates suspicions about the quality of that person’s future performance. A positive result also may cloud the lens through which past performance had previously been viewed, and mistakes that had been classified as minor take on a more serious aura. In both cases, the positive result causes negative predictions about the individual’s potential as a “good” worker.

One of the many criticisms of drug testing, of course, is that it is not, in fact, an accurate predictor of performance.\(^\text{20}\) The same can be said of many of the screening devices currently in use. The technology of monitoring will eventually improve, however, and it will become increasingly possible to make fine and accurate distinctions among individuals. While human behavior will always remain puzzling, the ability to select individuals who are capable of performing well will be refined. Moreover, devices such as computer monitoring fill the supervisory role so completely that any deficiencies in the initial employee selection process will be fully compensated for by comprehensive production records.

With this technology, employers will be able to identify the “perfect worker,” an individual who will fulfill the employer’s behavioral expectations and produce efficiently at the predetermined level. This “perfect worker” could be the answer to many of the problems of American industry. If employers could select and supervise their employees more effectively, expenses could be lowered and productivity increased. Employers could reduce the cost of hiring and training workers who ultimately fail to perform as expected and must be fired. By definition, production could be monitored and thus maintained at the optimal level. If science and technology make it possible to identify individuals who are likely to be absent because of substance abuse, to find those who may be inclined to steal from their employer, and to supervise individual work performance more closely and accurately than ever before, it is no surprise that employers are eager to take advantage of these devices.

\(^{19}\) The implementation of drug testing for current workers sometimes confronts employers with a problem they did not foresee. More than one management lawyer has received a call from a client asking, “Our best worker has just tested positive. Do we have to fire him?”

\(^{20}\) Drug tests that are required following an employee’s involvement in an accident may seem investigative rather than predictive, but since screens for most substances other than alcohol do not measure present impairment, the information obtained through such tests has little meaning. See Kaplan & Williams, Will Employees’ Rights Be the First Casualty of the War on Drugs?, 36 KAN. L. REV. 755, 763 n.29 (1988).
III. EXISTING LEGAL OBSTACLES TO SURVEILLANCE

As is often true with the advent of new technology, the price that may have to be paid for its use is litigation, at least until the relevant legal doctrines have been worked out, or until legislatures have responded in some fashion. Thus, employers hear a lot of warnings about employee privacy rights and the damage awards that can result from violations of those rights.\textsuperscript{21} As the law now stands, however, nonunion, private sector employees enjoy very little protection from the imposition of most kinds of employment monitoring devices.

There are very few statutes that specifically regulate employer monitoring. Periodically the nation experiences heightened concerns about the effects on citizens' privacy of information gathering and storing activities, but reforms generally have been directed only at the government\textsuperscript{22} or certain heavily regulated sectors of society, such as educational institutions.\textsuperscript{23} The few statutes affecting employers do so in almost an incidental fashion.\textsuperscript{24} The one exception is the regulation of employer use of the polygraph and other lie detection devices, and even there coverage is incomplete. Approximately half of the states now have laws that regulate the use of lie detectors in employment.\textsuperscript{25} Of these, however, only a few prohibit all use.\textsuperscript{26} Others simply prohibit employers from requiring an employee or applicant to submit to a test, but allow "voluntary" tests.\textsuperscript{27} Still others prohibit testing of only certain kinds of workers and do not regulate the testing of

\textsuperscript{21} Cf. Kiechel, \textit{The High Cost of Sexual Harassment}, \textit{FORTUNE}, Sept. 14, 1987, at 147 (relating how the joking attitude of managerial groups at seminars on sexual harassment changes when they are told of $100,000 settlements in such cases).


\textsuperscript{23} \textit{E.g.}, Family Education Rights and Privacy Act of 1974, 20 U.S.C. § 1232(g) (1982) (providing right of access to educational records by parents and students and controlling disclosure by educational institutions of personal data in those records to third parties).

\textsuperscript{24} For instance, the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681t (1982 and Supp. III 1985), which is aimed primarily at credit reporting agencies, also applies to employers who obtain consumer reports about employees or applicants for employment. Some statutes that would otherwise seem to apply to employment contain specific exceptions for certain workplace situations. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, 82 Stat. 197, codified as amended in various sections of U.S.C., prohibits the interception of wire or oral communications, but exempts the normal use of extension phones, 18 U.S.C. § 2510(5)(a) (1982), and allows employers to use "service monitoring" or "random monitoring" for "mechanical or service quality control checks," 18 U.S.C. § 2511(2)(a)(i) (1982).

\textsuperscript{25} For a complete description, see 19A Individual Empl. Rts. Manual (BNA) 541:i to 593:2 (Feb. 16, 1988).


\textsuperscript{27} See, e.g., \textit{Iowa Code Ann.} § 730.4 (West Supp. 1987).
others, most typically, law enforcement officers.28 Some states merely impose licensing requirements for examiners29 or restrictions on the areas of inquiry.30 Most of these state statutes provide for governmental enforcement only or contain modest civil penalties.31 Finally, within the last year or so, a few states have adopted legislation regulating drug testing. It is probably too early to discern any kind of trend, although most of these states have chosen to impose procedural requirements and restrictions on drug testing, rather than to ban it entirely.32

The common law ultimately will prove equally unhelpful in regulating, except in a very gross manner, the use of employer monitoring devices. Although "erosion" is too mild to describe what has happened to the employment-at-will rule in the last ten years,33 no state except Montana34 has come close to imposing a "just cause" limitation.

28. See, e.g., Md. ANN. CODE art. 100, § 95 (Supp. 1987) (law enforcement officers, employees of law enforcement agencies, and correctional officers excluded from ban on polygraph tests); cf. Long Beach Employes Ass'n v. Long Beach, 41 Cal. 3d 937, 719 P.2d 660, 227 Cal. Rptr. 90 (1986) (finding unconstitutional a statutory scheme that resulted in permitting polygraph tests only of public employees who are not "public safety officers").


31. See, e.g., Del. CODE ANN. tit. 19 § 704(c) (1985) ($500 fine or imprisonment for not more than 30 days, or both).


33. H. PERRITT, EMPLOYEE DISMISSAL LAW AND PRACTICE I (2d ed. 1987) ("[t]he erosion of the Employment-at-Will Rule"). Under the "traditional" employment-at-will rule, an employer could fire an employee at any time and for any reason, unless the parties had explicitly contracted to be bound by other terms. At the time of this writing, only a handful of states still adhere rigidly to this rule. The rest have adopted one or both of two major "exceptions" to the at-will rule: the public policy (tort) exception and the implied contract exception. See generally id.; W. Holloway & M. Leech, Employment Termination Rights and Remedies (1985).

34. Montana has done so by statute, the first in the country. The Wrongful Discharge from Employment Act, Mont. CODE ANN. §§ 39-2-901 to -914 (1987) prohibits discharges in three situations: (1) in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy; (2) not for good cause; or (3) in violation of express provisions of the employer's own written personal policy. Id. § 39-2-904. "Good cause" is defined as "reasonable, job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason." Id. § 39-2-903(5). The Act provides a remedy of lost wages and fringe benefits for no more than four years from the date of discharge, imposes a mitigation requirement, restricts awards of punitive damages to cases in which plaintiff has shown, by clear and convincing evidence, actual fraud or actual malice, and disallows any recovery for pain and suffering, emotional distress, or any other compensatory damages. Id. § 34-2-905. It is the exclusive remedy for wrongful discharge suits in Montana. Id. § 34-2-905(3).

California and a few other states have recognized an implied covenant of good faith and fair dealing in employment contracts, which is similar to a good cause requirement. In Cali-
standard on employers that have not agreed to one. Employers in
states with vigorous wrongful discharge doctrines may have to pay
more attention to decisions to fire employees, and more suits by
discharged employees may get beyond the motion-to-dismiss or sum-
mary judgment stage, but there are still many obstacles to recovery
by the plaintiff. Generally, wrongful discharge cases involve specific,
individualized events, such as filing a worker’s compensation claim
or refusing to break the law at the employer’s request. Policies and
practices that are applied uniformly and openly to all employees are
normally not the subject of successful wrongful discharge litigation.
Additionally, the discharged employee must point to some public
policy, usually in a state statute, that his or her firing allegedly
violated. Unless the state has adopted a restriction on the use of
a particular monitoring device, it will be hard for a court to find
the public policy involved; indeed, with regard to methods such as
drug testing, one could argue that public policy currently supports,
rather than opposes, their use.

37. See, e.g., Trombetta v. Detroit, Toledo & Ironton R.R., 81 Mich. App. 489, 265
N.W.2d 385 (1978).
38. Courts sometimes have to hunt diligently to locate the source of the public policy,
alleged she was fired after she refused to participate in a skit that involved “mooning”; public
policy found in the state indecent exposure statute), but these searches reinforce the strength
of their felt need to rely on a statute. Litigation under the other branch of wrongful discharge
law, the implied contract exception, eventually should dwindle as employers learn not to make
promises they do not wish to be forced to keep. See, e.g., Novosel v. Sears, Roebuck and
Co., 495 F. Supp. 344 (E.D. Mich. 1980) (disclaimer and acknowledgment that employment is
at-will contained in application for employment held sufficient to defeat implied contract
cause of action).
631, 500 A.2d 649 (1985) (upholding a verdict of $300,000 in compensatory damages and
$1,000,000 in punitive damages in favor of an employee who was fired for refusing to submit
to a polygraph exam; state statute prohibiting employers from requiring such tests provided
for prosecution as a misdemeanor by the Attorney General and a fine of no more than $100)
where employees were fired for refusing to sign a consent to taking a “psychological stress
evaluation test”; Arizona law regulates polygraphers only).
40. The signals are at least mixed, with some states taking positions at odds with that
Moreover, there is no recognized cause of action for "wrongful refusal to hire," or "wrongful supervision." Applicants who are not hired because they fail a pre-employment drug test are simply out of luck in most states, even if the employer failed to conduct a confirmatory test or used a fly-by-night laboratory. Similarly, VDT operators who object to computer monitoring of their work have no legal recourse.

With wrongful discharge theories generally not applicable, the chief vehicles for attacks on employer monitoring activities have been various torts of outrage, especially invasion of privacy, which is a catchall for several different theories, all of which concern the infliction of emotional distress. The theory most commonly used in workplace related suits is intrusion into seclusion, which involves notions of expectations of privacy, not only as to certain physical spaces, but also as to certain personal information or aspects of one's personal life. As with wrongful discharge, the potential for employer liability under these theories can be great, but the problems they pose for employers are not systemic. Invasion of privacy and related torts normally arise out of idiosyncratic responses to unique situations; they do not involve general applications of policy. (Indeed, sometimes it is the failure to follow policy in a particular employee's case that gets the employer into trouble.) Supervisors will always say and do

364, 374 (1987) (quoting W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757, 766 (1983) (quoting Muschany v. United States, 324 U.S. 49, 66 (1945)) (reversing the court of appeals' refusal to enforce, as against public policy, an arbitrator's award reinstating an employee who was found on company property in a car filled with marijuana smoke; the public policy must be "ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests').


42. Cf. Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986) (discharge of public sector employee on the basis of a single unconfirmed EMIT test was arbitrary and capricious; test manufacturer itself warned that positive results must be confirmed with another test), rev'd on other grounds, 833 F.2d 335 (D.C. Cir. 1987).

43. [Editor's note: See Höbert, supra note 32, at 833-39.]

44. 2 F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS § 9.6 (2d ed. 1986).

45. See, e.g., Ford v. Revlon, Inc., 153 Ariz. 38, 734 P.2d 580 (1987) (employer held liable for intentional infliction of emotional distress for failing to conduct a proper investigation of employee's complaints of sexual harassment, contrary to the specific terms of its grievance policy).
stupid or malicious things from time to time, but the frequency with which such incidents occur probably remains fairly constant. If anything, a reduction in the amount of interaction between supervisors and workers caused by the introduction of monitoring devices into the workplace might result in fewer instances of invasion of privacy.

Further, a crucial element of all of the torts of outrage is that the invasion of privacy or infliction of emotional distress be sufficiently egregious. The precise descriptions vary: "an unjustified intrusion . . . of such magnitude as to cause an ordinary individual to feel severely offended, humiliated, or outraged," 46 "something which would be offensive or objectionable to a reasonable person," 47 "extreme and outrageous" conduct. 48 Conduct that may seem offensive in one isolated situation, however, may lose that character in another setting. For instance, in Bodewig v. K-Mart, Inc., 49 a customer accused a cashier of taking four five-dollar bills belonging to the customer. When searches of the cashier's pockets, work area, and register failed to produce the bills, the cashier, who was female, was taken to the restroom by a female assistant manager and subjected to a strip search in front of the (female) customer. Needless to say, the money was not found. The cashier subsequently sued for outrageous conduct, a tort under Oregon law. The court found that although the store may not have intended to inflict psychological distress on the plaintiff, the employer-employee relationship between the two imposed additional duties on it, so that it could be liable if its conduct was "beyond the limits of social toleration and reckless of the conduct's predictable effects on plaintiff." 50

Compelling a strip search in front of a complete stranger seems outrageous enough, but let's change the facts. Assume that an employer, concerned about employee theft, but unable to catch anyone or even isolate any likely suspects, forms the belief that employees are stealing to finance their purchases of illegal drugs. Therefore, the company institutes a policy of mandatory drug testing as a means of identifying the users, and thus, the potential thieves. To be certain that employees cannot contaminate their urine samples or substitute a "clean" sample obtained elsewhere, the company requires the employees to urinate in front of an observer. Would an action for outrageous conduct be allowed with these facts? 51

50. Id. at 485, 635 P.2d at 661.
51. I am indebted to Professors Rothstein, Knapp, and Liebman for this analogy.
Physical observation is a component of many drug testing programs. In discussing the fourth amendment implications of public sector drug testing programs, a few courts have likened the observation requirement to a strip search.\textsuperscript{52} The trend of the decisions, however, allows observation if the drug test itself has been administered for proper reasons.\textsuperscript{53} If our hypothetical employer were in the public sector, it might lose on the ground that it did not have a reasonable individualized suspicion of drug use to support requiring a test.\textsuperscript{54} Vague, unfounded beliefs are not sufficient to justify testing if the reasonable individualized suspicion standard is used. Add, however, a customer’s accusation that she has observed an employee ingesting drugs, and even the strictest courts would uphold a test of the accused individual in the public sector setting.\textsuperscript{55} Since our hypothetical employer is in the private sector, it does not labor under any fourth amendment burdens and, therefore, does not have to justify its testing requirement at all.\textsuperscript{56} Bizarrely, then, the hypothetical, private sector,

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\item See, e.g., Lovvorn v. City of Chattanooga, 647 F. Supp. 875 (E.D. Tenn. 1986), aff’d, 846 F.2d 1539 (6th Cir. 1988).
\item The courts are still in the process of formulating standards for determining when governments may require urinalysis. While some courts have permitted random or blanket tests, see, e.g., Shoemaker (random testing of jockeys constitutional); National Treasury Employees Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987), cert. granted, 108 S. Ct. 1072 (1988) (upholding testing of employees seeking to transfer to certain “sensitive” jobs in drug enforcement); McDonnell v. Hunter, 809 F.2d 1302 (8th Cir. 1987) (upholding testing of prison guards either on a uniform basis or by systematic random selection), they have based their decisions on the strong governmental interests in the particular jobs for which testing was required. Other recent cases have involved testing of individual employees as to whom there was a reasonable suspicion of drug use, e.g., Everett v. Napper, 833 F.2d 1507 (11th Cir. 1987), or testing as part of a regular employment-related medical examination, e.g., Jones v. McKenzie, 833 F.2d 335 (D.C. Cir. 1987). Many district courts have struck down random testing of employees. E.g., Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986); Taylor v. O’Grady, 669 F. Supp. 1422 (N.D. Ill. 1987).
\item See Smith v. White, 666 F. Supp. 1085 (E.D. Tenn. 1987) (names of employees who allegedly used drugs were provided by a coworker who was undergoing treatment for substance abuse; he provided the names after being told he had failed a polygraph test during which he denied knowledge of employee drug use); Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Ga. 1985) (undercover agent placed in the work force because the city manager had “formed the belief” that work-related injuries were caused by employee drug use, reported the names of employees with whom he had smoked marijuana).
\item It is possible that fourth amendment standards will eventually be translated into the private sector tort law. A jury in Boston recently handed down what may have been the first verdict for a plaintiff in a private sector, nonunion drug testing case. Kelley v. Schlumberger Technology Corp., No. 85-4794-2 (D. Mass. Apr. 13, 1987), aff’d, 849 F.2d 41 (1st Cir. 1988) (verdict of $1 for invasion of privacy and $125,000 for negligent infliction of emotional distress; employer required drug test of plaintiff without reasonable suspicion). Less than two months later, a $485,000 verdict for the plaintiff was handed down in the much-discussed and long-
random drug testing, based on no factual justification, would probably be allowed under current law, whereas the Bodewig strip search, based on a minimal level of particularized suspicion, is subject to sanctions, at least under Oregon law.

Of course, there are other differences in the two sets of facts. The active participation of the customer in the chain of events, under circumstances that might lead a jury to believe she was trying to coerce the clerk into giving her money, undoubtedly influenced the Bodewig court. The clerk was the only person singled out for the humiliating treatment; no mention is made of whether similar strip searches had been conducted in the past, or whether employees were on notice that they might be subjected to such searches. There is a sense in the drug testing arena that employees have been warned and, therefore, are fair game. It may also be that we have become inured to drug testing. When the President of the United States announces that he has provided a sample, and when television news programs show many of the details of testing programs, including bottles of urine, public reactions are inevitably altered. If everyone is being tested, testing may not be so outrageous. As a practical matter then, the key may be achieving widespread use of a monitoring method. As a particular device is generally adopted and thus accepted, claims that it invades the privacy of affected individuals may be less successful. Moreover, more sophisticated technology will undoubtedly be much less intrusive in an obvious manner. It will gather more information about workers, but they will be less aware of it.

IV. Interests Affected by Monitoring

A. Autonomy

As discussed above, employees usually phrase challenges to monitoring schemes in terms of the right to privacy. “Privacy” sweeps too broadly, however. A more accurate characterization of employee concerns implicated by the widespread adoption of workplace monitoring includes several distinct interests. Indeed, there is a serious question whether employees have a privacy interest in the workplace at all. Unlike the home, a workplace is not private. Although there can be areas within the workplace, such as a locker or a desk, in which

awaited Luck v. Southern Pacific Transportation Co., No. 843230 (San Francisco, California, Super. Ct., Oct. 30, 1987). In that case, a computer operator was fired for refusing to participate in a random drug testing program. The jury found in her favor on her claims of wrongful discharge in violation of public policy, breach of the implied covenant of good faith and fair dealing, and intentional infliction of emotional distress.
employees might have some reasonable expectations of privacy, the activity of working is usually carried out in public.

One of the universal conditions of employment is supervision; another is an expectation of a certain level of production, however rigidly or loosely set. Employees certainly have no right to believe they will not be subject to observation, enforcement of rules, and measurement of production while they are working. In one sense, therefore, the installation of a closed-circuit television system in an area from which thefts have been occurring is merely the addition of another form of supervision to the existing traditional form, the physical contemporaneous presence of a supervisor. Similarly, the use of computer software that measures the key strokes entered by each individual VDT operator is just the substitution of a new way to measure production for older, more tedious, less accurate methods. Employees work with the knowledge that they are being supervised; it might be argued that the difference in technology is merely one of degree, not of kind.

Indeed, some might claim that objections to the supervisory omnipresence permitted by monitoring devices smack of the controversy over automobile radar detectors. Drivers are supposed to obey the speed limits at all times, not just when they know a police officer is near. Therefore, good citizens have no legitimate interest in owning or using radar detectors. Similarly, "[w]orking time is for


58. Cf. McLain v. Boise Cascade Corp., 271 Or. 549, 533 P.2d 343 (1975) (no invasion of privacy where employer, who believed employee with on-the-job injury was malingering, hired private detectives to conduct surveillance of employee; all of the activities observed by the detectives occurred outdoors and could have been observed by anyone). Depending on the nature of the business, an employee might expect his or her actions to be protected from observation by members of the public generally, but not from supervisors or fellow workers. Cf. Huskey v. National Broadcasting Co., Inc., 632 F. Supp. 1282 (N.D. Ill. 1986) (even in a prison, prisoners can have a justifiable feeling of seclusion from the outside world); Nader v. General Motors Corp., 25 N.Y.2d 560, 570, 255 N.E.2d 765, 771, 307 N.Y.S.2d 647, 655 (Ct. App. 1970) ("the mere observation of the plaintiff in a public place does not amount to an invasion of his privacy . . . [b]ut [a] person does not automatically make public everything he does merely by being in a public place . . . ").

59. See FMC Corp., 46 Lab. Arb. (BNA) 335 (1966) (Mitenthal, Arb.) (employer did not violate collective bargaining agreement when it installed a closed-circuit security system; the choice of methods of supervision is a management function).

60. But see Berger, What's New in Radar Detectors, N.Y. Times, Nov. 15, 1987, at 19, col. 1 (business section) (administrator of radar detector industry group says that detector owners are safe drivers who "have every right to know when they're under police surveillance").
work." Good employees have no need to know when they are being monitored. Therefore, they have no reason to object to continuous monitoring.

Employees do, however, have an interest in a certain degree of autonomy in the performance of their duties. This interest in autonomy cannot be absolute, for it necessarily conflicts with the employer's interests in production, discipline, and safety. Employees are not free to determine unilaterally the conditions and requirements of their employment. Even in a unionized workplace, employees, through their union, enjoy only the right to bargain with their employer over terms and conditions of employment and to back up their demands with economic action. Within the confines of the employer's ability to define the work, however, employees have an interest in some individual control over how they perform their jobs. For a secretary, this might mean deciding whether to do filing at the beginning or the end of the work day; for a white-collar worker, it might mean putting all telephone calls on hold until a project is finished. Some workers have very little control over their jobs; to them, the little bit of autonomy left may be even more significant.

Moreover, there is a qualitative difference between traditional supervision, which lets employees know when they are and are not being watched, and newer monitoring systems. Under the old regime the individual knows that observation cannot possibly be constant; under the new, the individual knows that it can. The closed-circuit TV may not be watched continuously by supervisors, but videotape makes it possible at any time to retrieve and watch any moment in any day. Even if no one will ever view all those hours of videotape, employees are still aware that someone might be watching, and they have no way of knowing when. Computer monitoring does make it possible to supervise all employees all the time, since the end of day printout can account for each employee's activities for the entire day. VDT operators work under the pressure of knowing that supervision is constant.

One of the important functions the right to privacy performs is protecting minor failures to comply with social norms. There are many rules of behavior, of which traffic laws are excellent examples, that almost everyone breaks at one time or another. Flagrant breaches may be punished, at least if they are observed or detected by those

61. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 n.10 (1945).
62. See First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 676 (1981) ("[I]n establishing what issues must be submitted to the process of bargaining, Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise . . . .").
in a position to enforce the rules, but most smaller breaches are simply tolerated. The knowledge that a degree of personal privacy exists allows people to commit small, discrete violations without fear of societal retaliation, punishment, or humiliation. This is possible only because, essentially, we have conspired to allow it. Society has tacitly agreed to a less-than-rigorous enforcement of some rules so that some violations will in fact go unnoticed and thus unpunished. As Professor LaFave has remarked with respect to the protections of the fourth amendment: "[W]e have never demanded 100 percent enforcement of the criminal law. Instead, we are committed to a philosophy of tolerating a certain level of undetected crime as preferable to an oppressive state." This situation changes under a system of constant observation. The individual who is aware of the observation is faced with a terrible choice between complying strictly with every rule and regulation or breaking some and hoping there will be no punishment. When the standards of compliance are not clear, the problem is exacerbated, for the individual who wants to comply will not know with certainty how to do so.

The same is true in the workplace. Even within a work force of "good," productive employees, no one works diligently, at 100 percent effort, for every minute of the day. A certain amount of "goofing off" is normal and, indeed, valuable. Under a regime of continuous monitoring, however, employees can become nervous about taking "too much" time in nonproductive activity, or not working "fast enough." Even when the standards of production are explicit, so that employees know exactly what is expected of them, continuous monitoring still can create stress. For instance, employees may reasonably fear that the rules will not be bent to deal with special circumstances. Rules that are not explicit can be even more


65. One recent survey of personnel managers found that employees spend a half hour or more each day gossiping with coworkers. Over the course of a year this lost time amounts to the equivalent of a three-week vacation. Many survey respondents, however, viewed the time as a valuable boost to "camaraderie and team spirit." Daily Lab. Rep. (BNA), No. 141, at A-16 (July 24, 1987).

66. An employee with a personal problem may realize his or her work is being affected, but hope that the problem will resolve itself before a periodic performance evaluation reveals the substandard work. Continuous monitoring procedures do not allow such lag time, and, therefore, the risk of job loss increases. The employee may be forced to reveal the nature of the personal problem as the price for saving his or her job. See 9 to 5, National Association of Working Women, Computer Monitoring and Other Dirty Tricks 7 (1986) (reporting that flight reservation clerks at United Airlines were allowed 12 minutes for bathroom breaks during a 7.5 hour shift; any amount over that limit was grounds for a disciplinary warning).
dehumanizing, because workers never know when or if they have done enough.

There has always been tension between employers and employees over the proper amount of work to be done in a given period of time.\(^{67}\) As one worker once commented,

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\text{We don't want to work as fast as we are able to. We want to work as fast as we think it's comfortable for us to work. We haven't come into existence for the purpose of seeing how great a task we can perform through a lifetime. We are trying to regulate our work so as to make it an auxiliary of our lives.}^{68}\]

When employees believe that their employer has imposed unfair standards on them, they often find ways to diminish the impact of those standards or at least make their displeasure clear. For instance, it has been reported that clerical workers subjected to early forms of computer monitoring quickly learned to fool the machine by holding down one key to increase the number of key strokes counted by the system.\(^{69}\) Similarly, we are all familiar with accounts of individuals who overcome drug testing programs by substituting “clean” urine or contaminating their own specimen with substances that will mask any drug metabolites. Employers, of course, can find ways to fight back. More sophisticated software programs for monitoring now have the ability to detect and disregard constant repeats of a single key. Drug tests are now often conducted under elaborate “safeguards” to ensure an accurate specimen.\(^{70}\)

The law is on the employer’s side in this debate. Absent promises to the contrary, an employer is free to structure the work day any way it wants and to mete out discipline of its choice for failures to comply. Although one would hope for a sense of humanity from employers, it remains true that an employee who spends a few extra minutes on a break can be fired, no matter how compelling the reason for the tardiness. Not only is working time working time, but the employer is free to expand the working time at will by, for instance, demanding that employees give up their leisure to work overtime. Employee refusals to work overtime, or slowdowns in the face of


\(^{70}\) The federal government's guidelines for drug testing programs contain detailed and graphic descriptions of techniques to be used to prevent employee cheating. \textit{Department of Health and Human Services, Mandatory Guidelines for Federal Workplace Drug Testing Programs}, 53 Fed. Reg. 11,970 (Apr. 11, 1988).
increased production requirements, are unprotected activities under federal labor law, and employers are free to retaliate by firing the offending workers.\textsuperscript{71}

Although the law protects the employer’s ability to deny workers any degree of autonomy in the performance of their jobs, as a practical matter, employers rarely could exercise that power to its full extent until the advent of computer monitoring. Unlike human beings, computers are omnipresent, tireless, ever vigilant, and accurate. The battle lines have been drawn for the ultimate clash between employer demands for production and employee desires for autonomy. The early evidence is that both sides may be losing. Some studies have shown that workers who are supervised by computer monitoring suffer more stress and stress-related illnesses than nonmonitored workers, and that productivity actually falls, rather than rises.\textsuperscript{72} Computer monitoring may, in the short run, lead to higher turnover, absenteeism, and disaffection because of the stress felt by monitored workers. In the long run, it is bound to stifle individual initiative and creativity, for the workers who are able to adapt will do so by becoming automatons. In either case, the price to both the individual and the employer is high.

\textbf{B. Fairness}

As a society, we have exhibited a concern that employment-related decisions be fair. The antidiscrimination laws enacted in the last quarter-century\textsuperscript{73} are all based on the fundamental concept of fairness for the individual. Workers should be treated equally on the basis of their ability to perform the job, and not on the basis of irrelevant or arbitrary criteria. Even requirements that appear to be rationally based may be found to violate Title VII if they have an exclusionary impact on members of a protected group and are not truly related

\textsuperscript{71} Elk Lumber Co., 91 N.L.R.B. 333 (1950) (work slowdown not protected under NLRA); Valley City Furniture Co., 110 N.L.R.B. 1589 (1954), enforced, 230 F.2d 947 (6th Cir. 1956) (refusals to work overtime not protected).

\textsuperscript{72} Compare Computer Monitoring Increases Stress, Reduces Privacy of Service Sector Employees, Daily Lab. Rep. (BNA), No. 191, at A-4 (Oct. 5, 1987) (reporting claims that computer monitoring takes a long-term toll in quality of service and morale and health of the work force) with The Changing Workplace, supra note 12, at 8-21 to 8-25 (1985) (asserting that clerical work is a high-stress occupation and that occupational stress is related to job structure and the quality of supervision, not to whether VDTs are used).

to success in the job." Title VII was intended to achieve "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." 74

Objections that some methods of monitoring are inaccurate or incapable of conveying meaningful information reflect fairness, not necessarily privacy, concerns. For instance, often before they raise the invasion of privacy issues, opponents of drug testing criticize current tests as yielding a high number of false positives and failing to measure current impairment. These deficiencies probably will be resolved in time. More accurate methods that do not entail the level of intrusiveness that seems to be necessary for urinalysis will be developed, and perhaps someone will invent the equivalent of the breathalyzer to detect current impairment by drugs. Arguments based solely on technical problems are always at risk of being mooted by technical improvements, and those who currently object that drug testing is unfair because it is inaccurate will be left, seemingly, with the "obvious" conclusion that an accurate test is inherently fair.

Methods of monitoring that are truly accurate might seem to be the very embodiment of fairness. The computer that monitors VDT operators, for instance, does not know the employee's race, sex, age, marital status, or any other nonperformance attributes and, therefore, can make distinctions among individuals only on performance-related grounds. By measuring only job performance, computer monitors would be incapable of imposing the kinds of "built-in headwinds" and "artificial, arbitrary, and unnecessary barriers" condemned by the Title VII disparate impact cases. In addition, by removing most, if not all, of the human element in supervision, computer monitoring would eliminate the opportunity for the intentional discrimination that was clearly the primary thrust of the employment discrimination laws. Management decisions based on animosity, spite, or exceedingly poor judgment, which often lie at the root of wrongful discharge and invasion of privacy litigation, could be greatly reduced by reliance on monitoring devices, rather than unsubstantiated supervisory conclusions, in decisionmaking.

The discrimination cases display a great ambivalence about deci-

74. In the landmark case, Griggs v. Duke Power Co., 401 U.S. 424 (1971), the employer required workers to have a high school diploma or score above a certain level on a mental aptitude test. The district court found that the traits purportedly measured by the test, "the ability to understand, to think, to use good judgment," were things an employer "would logically want to find in his employees." Griggs v. Duke Power Co., 292 F. Supp. 243, 250 (M.D.N.C. 1968), aff'd, 420 F.2d 1225 (4th Cir. 1970), rev'd, 401 U.S. 224 (1971).

sions based on subjective or vague standards. When supervisors rate on the basis of subjective standards, there is “no way of knowing precisely what criteria of job performance the supervisors [are] considering, whether each of the supervisors [is] considering the same criteria or whether, indeed, any of the supervisors actually appl[y] a focused and stable body of criteria of any kind.” Subjective standards can be used to mask intentional discrimination, but proof of that discriminatory intent can be extremely difficult to produce. If subjectivity is removed and decisions are based on the application of accurately recorded and maintained data to rigid performance standards, there is little opportunity for invidious discrimination. Productive workers might in fact favor computer monitoring. Instead of being considered as part of a faceless workplace average, they would be assured of receiving credit for their individual achievement.

Thus, computer monitoring has the potential to be “an effective weapon in protecting equal employment opportunity because it has a unique capacity to measure all applicants objectively on a standardized basis.” The quoted language comes from Albemarle Paper Co. v. Moody, a Title VII case involving the validity of a pre-employment paper and pencil test under the then-existing EEOC testing guidelines. The fate that has befallen written tests in Title VII litigation might counsel against too much optimism over computer monitoring. Some employers have spent many years and hundreds of thousands of dollars in developing a test, only to learn that it is not sufficiently valid. To be sure, the tests are found invalid because

76. Laycock, Statistical Proof and Theories of Discrimination, 49 LAW & CONTEMP. PROBS. 97, 100 (1986).
78. The slippery nature of discriminatory intent is at the heart of a case like Watson v. Fort Worth Bank & Trust, 798 F.2d 791 (5th Cir. 1986), cert. granted, 107 S. Ct. 3227 (1987), in which the court of appeals held that disparate impact analysis, which does not require proof of intent, may not be used to challenge employment decisions based on subjective criteria.
79. The Changing Workplace, supra note 12, at 6-4, quotes a customer service clerk as saying, “Before we got our terminals, records were kept very poorly on how each operator was doing with the calls. It all depended on what your supervisor saw you doing, and the luck of whether you were performing well when she came over to check . . . . Now, there is a complete record of how many calls I handled each time period, what kind of call it was—in terms of which kind of problem or complaint—and how I handled it. My bonus pay is based on my achievement, and I like that. I do my job well and I always get my bonus for doing that.”
82. One employer spent $1,250,000 on a validation study that was found inadequate. United
they fail sufficiently to measure ability to perform the actual requirements of the job. By comparison, computer monitoring would satisfy the requirement of accuracy, and since the courts generally allow employers to determine the content of their jobs, the standards imposed by computer monitoring would by definition be job-related.

Discrimination law might not be directly implicated, then, but the lessons it has taught may still be useful. For instance, critics of the disparate impact theory under which tests are challenged have argued that the extreme difficulty of validating selection devices has led employers to abandon merit selection and adopt quota hiring, with the result being an inferior work force.\textsuperscript{83} These objections have caused proponents of the theory to evaluate more fully the means by which employees are normally selected from a pool of applicants. At least two facts leap into view. First, many people can be qualified for a given job; "there is rarely a single, 'best-qualified' person for a job."\textsuperscript{84} Second, contrary to the assertions of critics, employment systems in this country traditionally have been based, in part, on a variety of factors unrelated to merit. Veterans' preferences, civil service systems, tenure laws, and seniority provisions in collective bargaining agreements all reflect values other than merit. Seniority systems often function in a counterintuitive fashion by relegating less experienced workers to jobs that would be safer if filled by more experienced

\textsuperscript{83} See, e.g., Meltzer, \textit{The Weber Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment}, 47 U. Chi. L. Rev. 423, 426-27 (1980). Courts often reflect this concern without articulating it by relaxing the application of the disparate impact principle when the job in question involves a high degree of risk to third parties. See, e.g., Spurlock v. United Air Lines, Inc., 475 F. 2d 216, 219 (10th Cir. 1972) ("The risks involved in hiring an unqualified applicant are staggering. The public interest clearly lies in having the most highly qualified persons available to pilot airliners. The courts, therefore, should proceed with great caution before requiring an employer to lower his preemployment standards for such a job."); see generally McGarity & Schroeder, \textit{Risk-Oriented Employment Screening}, 59 Tex L. Rev. 999 (1981).

\textsuperscript{84} Johnson v. Transportation Agency, 107 S. Ct. 1442, 1457 n.17 (1987) (quoting Brief for American Society for Personnel Administration as \textit{Amicus Curiae} at 9) ("An effective personnel system will bring before the selecting official several fully-qualified candidates who each may possess different attributes which recommend them for selection. Especially where the job is an unexceptional, middle-level craft position, without the need for unique work experience or educational attainment and for which several well-qualified candidates are available, final determinations as to which candidate is 'best qualified' are at best subjective.")
workers,\textsuperscript{85} or by rewarding more senior employees at a time when they actually may be less productive than more junior employees.\textsuperscript{86} Nevertheless, even nonunion employers, who are under no obligation to honor workers' seniority, often do so. This is undoubtedly because seniority systems help to reduce employee turnover by providing employment stability for individual workers and to foster a sense of commitment to the company, which may lead to higher productivity.\textsuperscript{87}

If, then, fairness in the workplace can be defined as including considerations in addition to an absolute judgment of performance, the assessment of computer monitoring assumes a different posture. It may not be "fair" to record and use for evaluation purposes the number of key strokes entered per day by each worker, or the number of minutes each worker spent on breaks each day. While production is important, it can be measured in ways that do not require total surveillance of each worker. For example, assessments of work turnover could be made by group, rather than by individual, or on a weekly, rather than a daily, basis.

It also can be argued that although fairness requires that equals be treated equally, it also mandates that differences among individuals be taken into account in appropriate fashion. One of the time-honored arguments employers make to their work forces during a union organizational campaign is that the rigidity of a collective bargaining agreement will force the employer to treat everyone identically and will not allow special dispensations in unusual circumstances.\textsuperscript{88} Employees are rightly suspicious of these exhortations, for they are often all too familiar with their employer's unequal application of the rules, which may be the reason they are organizing in the first place. On the other hand, it is true that people are not equal and that there are differences among individuals in ability, training, experience, interest, and attitude. Professor Laycock points out that these very real differences help to explain why it is so hard for plain-

\textsuperscript{85} For instance, in Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974), cert. denied, 419 U.S. 1122 (1975), the seniority system allowed the most experienced bus drivers, who were statistically the safest, to bid for relatively easy routes, while more junior drivers were stuck with the more dangerous routes.


\textsuperscript{88} See, e.g., Jamaica Towing, Inc., 236 N.L.R.B. 1700, enf'd, 602 F.2d 1100 (2d Cir. 1979) (employer told employees that "if they decided in favor of union representation he 'would have to dock them for being late,' which he was not then doing, and that his friendly relationship with them 'would not be the same . . . [and] in the future would be strictly by the book'").
tiffs to win the one-on-one disparate treatment discrimination cases. While part of the problem is the elusive nature of the motive element, another part, he contends, is that people are different. When judges actually examine the qualifications of the plaintiff and compare them to the employer's explanation, they often find that the plaintiff was in fact less qualified than the person chosen.99

There are times when we might want employers to bend the rules and treat individuals differently. The employee who is distracted by the serious illness of a family member might not be able to perform at top level. The employee with an alcohol or drug dependence problem may be on the verge of discharge for absenteeism, but then ask for time off to enter a rehabilitation program. In these situations, fairness would seem to require the employer to overlook the poor performance for a time in the case of the first individual, and allow the leave in the case of the second. There might be some limits beyond which the special treatment should not extend, but most people would probably agree that the employer should take these personal matters into account. What we are suspicious of in the discrimination area is not so much the rulebending but the refusal to treat similarly situations that are similar in kind even if not factually identical,90 or the granting of favors in situations that seem to benefit only majority-group members.91

Computer monitoring would not prevent employers from taking special circumstances into account, but it would make it much more difficult to do so. As a practical matter, it will be too easy to make decisions on the basis of the computer printout and analysis. The cold numbers tend to take on a life of their own. After all, they are "correct," so why should excuses be tolerated?

C. Quality of the Work Environment

Work is central to the life and identity of most people. We spend

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91. For instance, on remand from the Supreme Court's decision in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Eighth Circuit found that the refusal to rehire the black plaintiff because he had engaged in an unlawful "stall-in" on defendant's property as part of a civil rights protest was a legitimate nondiscriminatory reason, even though defendant had in the past rehired white employees who had committed unlawful acts during strikes against it. Green v. McDonnell Douglas Corp., 528 F.2d 1102 (8th Cir. 1976), aff'd, 390 F. Supp. 501 (E.D. Mo. 1975).
92. See, e.g., Autry v. North Carolina Dep't of Human Resources, 820 F.2d 1384 (4th Cir. 1987) (not unlawful to promote a white employee instead of the black plaintiff, where the white was a personal friend of the promoting official and the daughter of a state political figure; friendship and politics, not race, were the bases for the decision).
a major portion of our adult lives at work, and generally we identify ourselves by our jobs. "The question, 'Who are you?' often solicits an organizationally related response. . . . Occupational role is usually a part of this response for all classes: 'I'm a steelworker,' or 'I'm a lawyer." The pivotal role of employment in an individual's life necessitates that opportunities be provided fairly. It also means that people have a profound interest in the conditions, both physical and psychological, under which they must labor. This interest goes beyond the autonomy concern of individual freedom to structure the work and takes in concern over the entire working environment. Use of monitoring devices can have a profound effect on working conditions, particularly when employees are not consulted or provided an opportunity for input in their implementation."

Unorganized workers face an "uncontrollable risk" of losing their jobs, and generally they know it. When an employer installs a computer monitoring system or institutes some other form of surveillance, the risks grow immeasurably, for employees have an even smaller sense of having any control over the situation. Although employers have a legitimate interest in efficient production, employees also have an interest in having some say in the conditions of their employment. As Professor St. Antoine has observed, there is a moral value involved in whether employees must be the silent victims of management decisions."

Ironically, in this area the manufacturing and the service sectors of the economy seem to be heading in divergent directions. In the service sector production and performance have traditionally been hard to measure. Before the advent of computer monitoring, the only way to determine how many documents a secretary typed in a day was physically to count the pages. The only way to learn how many customers a telephone clerk served was to stand beside the clerk continuously and count the calls. In addition, many service sector jobs involve interaction with members of the public, which sometimes can disrupt the rest of the day's work. On the other hand, assembly-line manufacturing is easier to supervise than other kinds of activities. The number of items rolling off the line each day can be counted, and the line can be set to operate at a certain pace. Every worker

93. [Editor's note: See Hanson, Some Social Implications of Drug Testing, 36 Kan. L. Rev. 899 (1988.).]
performs an assigned task, so that, in theory, mistakes can be traced back to the person who made them. General inefficiencies may be difficult to pinpoint and deal with, but at least the bottom-line production figures are clear.

Recently, however, manufacturing employers have become concerned about low productivity and worker alienation. There has been an enthusiastic interest in management techniques of other countries, especially Japan, with their emphasis on worker participation.\textsuperscript{96} American companies have begun to establish quality of worklife programs that provide employee input and participation in the decision making process. One study has reported that one-third of Fortune 500 companies have established programs in participative management.\textsuperscript{97} The General Motors-UAW agreement for the new Saturn plant, which provides for nonadversarial modes of decision making, a team concept that provides full participation by employees, and increased job security, is a striking example of cooperation between labor and management.\textsuperscript{98}

Meanwhile, as some manufacturing jobs may be becoming more humane, the service sector seems to be marching toward the assembly line structure manufacturers are abandoning. Computer monitoring is most effective when the work is divided into discrete tasks that are separately assigned. With the job broken down into its component parts, workers can be measured on the basis of their performance of one task, without the disruptions and slowdowns that a variety of tasks entails. The availability of monitoring thus provides a large incentive to restructure the work in an office as if it were an assembly line. As one commentator has remarked, workplace monitoring contributes "to the rationalization of the production process... in fact, a new and decisive stage of its taylorization."\textsuperscript{99}


\textsuperscript{98} For a description of the planning and negotiation of the Saturn project, see Hartwig, New Directions in Collective Bargaining, in American Labor Policy, supra note 95, at 240.

\textsuperscript{99} Simitis, supra note 94, at 722 (footnote omitted). "Taylorization" is the term used to describe the theories of Frederick W. Taylor and his disciples, who developed the idea of "scientific management" through observation of jobs and measurement of workers to determine the positions for which they were best equipped. Taylor described his theories in F.W. Taylor, The Principles of Scientific Management (1911).
At one time, many clerical jobs were perceived as having intangible benefits that outweighed such shortcomings as relatively low pay. Employees could work at their own pace, make the occasional personal phone call, leave early, or arrive late if necessary. For many jobs, all that is now a thing of the past, as the computer has become the tyrant of the office. If assembly-line production has proved unsatisfactory for many manufacturers, one wonders why so many office employers are rushing to adopt it and how long it will take these employers to realize its shortcomings.

V. THE FUTURE OF THE TECHNOLOGICAL WORKPLACE

The accepted response to societal problems is often legislation that attempts to remedy identified abuses and at the same time balance the interests of all parties involved. When it comes to dealing with employment monitoring issues, however, legislators face an exceedingly difficult task. There are so many different types of employer testing and monitoring devices, with new developments coming along virtually every day, and so many different kinds of workplaces in which they can be used, that a single solution probably is impossible.

One obvious suggestion comes to mind. All employees should have a statutory right of access to their personal files, including the right to dispute information the employee believes is inaccurate. Enactment of access laws by all the states would be an important, but relatively minor, improvement over the current situation. Unfortunately, freedom of information and data access laws all contain an inherent weakness. To be effective, they require awareness of the right and the exercise of individual initiative. A statutory right of access to a personnel file is meaningless if employees do not know about the right or are reluctant to assert it. Access laws often end up as tools for the educated and powerful, not for their originally intended beneficiaries.

Further, access to records is not always a solution. An individual's personnel file may not reveal why a particular decision was made about that person. Employment decisions often involve a comparison of several individuals, but employers would undoubtedly (and ironically) raise the "privacy" interests of the other employees in refusing to reveal comparative information. Moreover, records are

100. Some states already have access laws, although they contain varying restrictions. See, e.g., Conn. Gen. Stat. Ann. §§ 31-128a to -128h (West 1987) (access limited to twice per year; access to medical records only to the employee's physician). For a complete description of existing state laws, see Individual Empl. Rts. Manual (BNA) 541:1 to 593:2 (Feb. 16, 1988).
102. See, e.g., Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979) (employer's refusal to
sometimes created when the possibility of having to make a decision becomes apparent. An employee’s behavior will then be recorded in order to justify a decision to fire him or her.103 Finally, if the personnel file reflects the results of computer monitoring or other forms of surveillance, employees who did not have any input in setting up the system will have no way of challenging the information it produces.

Another possible legislative reform is regulation, or in some instances prohibition, of the use of monitoring devices,104 but this approach also has serious flaws. Consider the polygraph. Virtually all of the scientific evidence indicates that polygraphs are inherently invalid as instruments for detecting honesty or dishonesty because there is no distinctive physiological change associated only with lying.105 In spite of the overwhelming nature of the evidence, the device is subject to only a patchwork of sporadic and ineffective regulation.106 If nothing can be done about a device as to which there is a general consensus of invalidity, there is little hope that legislation regulating other, more accurate methods of monitoring would ever be widely enacted.

Legislation to deal with specific devices has a further defect. Technology moves on. It may take the legislature years to hammer out the definitive expression of its wishes in an area, only to have a new technological development render the statute meaningless, or at least not as comprehensive as intended. For instance, a hole in the coverage of the 1968 federal wiretapping law has been opened because the act’s complex definition of “wire communication” has been held not to include a recent and popular device, the cordless telehone.107 Related to the inevitability of the march of progress is

disclose to union, on privacy grounds, the scores of individual employees on psychological aptitude test upheld); New Jersey Bell Tel. Co. v. NLRB, 720 F.2d 789 (3d Cir. 1983) (employer did not have to turn over to union absence and tardiness records containing “highly personal” information without each employee’s written consent).


104. States are beginning to regulate drug testing. See Comment, supra note 32.


106. For a discussion of the extent of state regulation, see supra text accompanying notes 25-31. As this article was going to press, Congress passed and the President signed the Employee Polygraph Protection Act of 1988, Pub. L. No. 100-347, 102 Stat. 646, which prohibits most private employers from using lie detectors to screen job applicants or test current employees.

the tendency of legislatures to deal with one specific issue and not to enact comprehensive statutes that could cover a variety of circumstances. Most judges are scientifically uneducated and, therefore, will be reluctant to extend existing laws to new technology without legislative guidance.

An additional obstacle to dealing with workplace monitoring is that even if some form of comprehensive legislative approach could be fashioned, there is no existing body to deal with complaints about violations. In unionized facilities, grievance and arbitration procedures are already in place and conceivably could handle disputes, but unorganized workplaces have no established mechanism through which employees can express their complaints. In the current political climate, legislatures are unlikely to establish new agencies to handle workplace technology matters, and allowing employees to have disputes resolved in the courts will also meet with vociferous objections.\textsuperscript{108}

Even if legislative reform holds little promise, the scope of employment monitoring may have outer limits, beyond which it may collapse of its own weight. There are several reasons to suspect that at some point the cost of implementing yet another type of monitoring will exceed the expected returns. First, presumably the human ability to work can be pushed only to a certain point, at least without the development of new production technologies that increase the output possible with the same degree of worker effort. The initial introduction of monitoring devices may result in an increase in production or decrease in absenteeism, depending on the goal of the device, but eventually, the marginal gains possible with the adoption of each new monitoring method should diminish.

Second, employees may "revolt," either quietly or loudly. If they believe that monitoring causes stress and unhappiness, they may simply quit and take jobs that do not involve the same degree of monitoring.\textsuperscript{109} If the country's shift to a service economy and the computerization of the workplace result generally in jobs that require fairly low

\textsuperscript{108} One of the most influential early articles on employment-at-will, Summers, \textit{Individual Protection Against Unjust Dismissal: Time for a Statute}, 62 VA. L. REV. 481 (1976), predicted that courts would be reluctant to create new causes of action that would further increase docket congestion. The courts have surprised Professor Summers and many other observers by eagerly embracing wrongful discharge doctrines. In 1982 he commented that the area of employment-at-will has changed faster than any other doctrine in the history of American labor law. H. Perritt, \textit{EMPLOYEE DISMISSAL LAW AND PRACTICE} 21 n.45 (2d ed. 1987).

\textsuperscript{109} Alternatively, workers could demand additional compensation for the risks to their well-being posed by workplace conditions. This is the theory of wage premiums, which is much discussed in the area of occupational safety and health. \textit{See generally} W. Viscusi & W. Magat, \textit{Learning About Risk—Consumer and Worker Responses to Hazard Information} (1987); W. Viscusi, \textit{Risk by Choice—Regulating Health and Safety in the Workplace} (1983).
levels of skill, employee turnover may not be a great problem, for unskilled labor may be readily available and on-the-job training inexpensive. The Department of Labor projects, however, that most new jobs will require greater levels of education and skill than might be thought.\textsuperscript{110} Replacing highly skilled employees will be much more difficult and expensive. Additionally, people who hold highly skilled technological or managerial positions are used to having a great deal of control over the way they perform their jobs. It may be one thing to impose a high level of control and monitoring on traditional clerical workers, but white collar workers may be much more resistant and resentful of such techniques.\textsuperscript{111} These are precisely the types of individuals who are likely to vote with their feet by seeking other employment. Monitoring that causes high turnover rates among valuable workers may not be worth implementing.

Third, an alternative form of employee rebellion against monitoring could be unionization and demands to deal with the situation through collective bargaining. Several national unions are already heavily involved in workplace surveillance and monitoring issues,\textsuperscript{112} and unorganized workers might be expected to turn to them. Moreover, gains achieved in unionized workplaces often influence conditions in nonunion settings, either because nonunion employers wish to retain that status and, thus, will try to eliminate causes of worker dissatisfaction that might lead to organization, or because conditions of employment commonly found in unionized facilities tend to become accepted as standards. On the other hand, many employers may not be mandatory subjects of bargaining under current Labor Board rulings;\textsuperscript{113} employers may act without prior notice to and bargaining with the union, and unions may not insist on their position or strike over it. This means that the ability of unions to achieve substantial gains concerning these matters depends on their relative strength in that workplace and against that employer.\textsuperscript{114} Further, since unions today represent less than eighteen

\textsuperscript{110} See supra note 13.

\textsuperscript{111} There are, of course, forms of employer control exerted in the white collar workplace as well. They may be more subtle, but presumably they are equally effective. See Hanson, supra note 93, at 907-17.

\textsuperscript{112} Among the most prominent have been 9 to 5, National Association of Working Women and the Service Employees International Union. See, e.g., VDT-Related Problems a Serious National Threat, 127 Lab. Rel. Rep. (BNA) 111 (Jan. 25, 1988) (describing a report on health problems of VDT users prepared by the two unions).

\textsuperscript{113} First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981) (economically motivated partial closing is not a mandatory subject of bargaining); Otis Elevator, 269 N.L.R.B. 891 (1984) (transfer of operations from one facility to another for organizational efficiency not a mandatory subject of bargaining).

\textsuperscript{114} This is true as to all issues, but employers' actions concerning mandatory subjects of bargaining are more restricted by legal considerations. See NLRB v. Katz, 369 U.S. 736
percent of the labor force,\(^{115}\) their influence, as a practical matter, is fairly limited, especially in sectors of the economy, such as the service sector, that traditionally have not been unionized.

VI. Conclusion

That there are no easy solutions to the issues raised by the advent of sophisticated forms of employment monitoring does not mean that the subject should be ignored. Further study of the effects of monitoring on worker health and productivity should be performed. Legislatures should remain alert to particular areas of abuse and act to remedy them, as they may be beginning to do with drug testing. Employers must resist the urge to buy into the latest "quick fix." The issues facing our economy are much more complicated than poor worker performance, yet the basic premise of the monitoring technology is that the current state of affairs is all, or almost all, the fault of workers. This "blame the victim" mentality often surfaces, but is rarely helpful. Society instead should search for solutions that involve both employers and employees in a cooperative venture to improve productivity and decrease costs. We all are potentially the subjects of employment monitoring, and, thus, should take seriously the threats it poses.

\(^{115}\) In 1986, the latest year for which figures were available at the time of this writing, 17.5% of all workers in the United States were union members, and 19.9% were represented by unions. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, EMPLOYMENT AND EARNINGS 219 (Jan. 1987).